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SELECTED CASES

ON

WATER RIGHTS

AND

IRRIGATION LAW

IN

CALIFORNIA AND WESTERN STATES.

BY

GAVIN W. CRAIG, LL.M.,

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PREFACE.

The purpose in selecting these cases has been to furnish as complete a study as possible of the Law of Water Rights. Because of lack of space where the California and Colorado doctrines conflict upon any principle, no attempt has been made to use cases establishing the Colorado doctrine.

In arranging the cases it has been the aim to place them in such order as to follow the growth and development of one principle from another. Such an arrangement should aid the student to more readily understand the underlying reasons and sound logic upon which this branch of our jurisprudence has been built.

The chief advantage of the study of law by cases is that the student is trained by this method better than by any other to extract from the cases the principles of law upon which the decision is based. Therefore, the statements of reporters, and points, authorities and arguments of counsel, have been left out.

For the sake of brevity and a clearer understanding of the law, parts of decisions dealing with other questions than those having to do with Water Rights have also been omitted.

As the cases selected are intended to be used by those desiring a knowledge of the Law of Water Rights as it exists in the Pacific and some of the semi-arid states of the west, the latest decisions of the courts of these states are presented rather than English, eastern or older western cases.

GAVIN W. CRAIG.

Los Angeles, Cal.

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TABLE OF CASES.

	Page
Anaheim Union Water Co. et al. v. Fuller et al., 150 Cal. 327, 88 Pac. 978.. . . .	20
Barclay v. Abraham, 121 Iowa, 619, 100 Am. St. Rep. 365, 96 N. W. 1080, 64 L. R. A. 255.....	315
Boehmer v. Big Rock Irrigation District, 117 Cal. 19, 48 Pac. 908..	28
Bowman et al. v. Virdin, 40 Colo. 247, 90 Pac. 506.....	173
Burr v. Maclay Rancho etc. Co., 154 Cal. 428, 98 Pac. 260.....	306
Cave et al. v. Tyler et al., 133 Cal. 566, 65 Pac. 1089.....	196
Cole et al. v. Logan, 24 Or. 304, 33 Pac. 568.....	155
Conrad et al. v. Arrowhead Hot Springs etc. Co. et al., 103 Cal. 399, 37 Pac. 386.....	175
De Wolfskill v Smith et al., 5 Cal. App. 175, 89 Pac. 1001.....	120
Duckworth et al. v. Watsonville etc. Co. et al., 150 Cal. 520, 89 Pac. 338.....	211
Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811.....	367
Ferreia v. Knipe, 28 Cal. 341, 87 Am. Dec. 128.....	1
Fifield v. Spring Valley Water Works, 130 Cal. 552, 62 Pac. 1054..	68
Fisher v. Feige, 137 Cal. 39, 92 Am. St. Rep. 77, 69 Pac. 618, 59 L. R. A. 333.....	64
Forbell v. City of New York, 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644, 51 L. R. A. 695	241
Gould v. Stafford, 91 Cal. 146, 27 Pac. 543.....	41
Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299.....	237
Hargrave et al. v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390..	200
Harris et al. v. Harrison et al., 93 Cal. 676, 29 Pac. 325.....	11
Heilbron et al. v. Fowler etc. Co., 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535.....	232
Hildreth v. Montecito etc. Co., 139 Cal. 22, 72 Pac. 395.....	361
Hudson et al. v. Dailey et al. (Cal., Dec. 1, 1909, L. A. No. 2234)..	345
Jones et al. v. Conn, 39 Or. 30, 87 Am. St. Rep. 634, 64 Pac. 855, 54 L. R. A. 630.....	32

	Page
Katz et al. v. Walkinshaw, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.....	245
Kendall et ux. v. Joyce et al., 48 Wash. 489, 93 Pac. 1091.....	141
Los Angeles v. Pomeroy et al., 124 Cal. 597, 57 Pac. 585.....	320
Low v. Schaffer et al., 24 Or. 239, 33 Pac. 678.....	135
Lower Tule etc. Co. v. Angiola etc. Co., 149 Cal. 496, 86 Pac. 1081..	150
Lux et al. v. Haggin et al., 69 Cal. 255, 10 Pac. 674.....	71
McClintock v. Hudson et al., 141 Cal. 275, 74 Pac. 849.....	267
McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384....	144
Morton v. Oregon etc. Ry. Co., 48 Or. 444, 120 Am. St. Rep. 827, 87 Pac. 151.....	49
Newport et al. v. Temescal Water Co., 149 Cal. 531, 87 Pac. 372, 6 L. R. A., N. S., 1098.....	272
Nielson et al. v. Sponer, 46 Wash. 14, 123 Am. St. Rep. 910, 89 Pac. 155	62
Ortman et al. v. Dixon et al., 13 Cal. 33.....	130
Rogers et al. v. Overacker, 4 Cal. App. 333, 87 Pac. 1107.....	4
Sanguinetti v. Pock, 136 Cal. 466, 89 Am. St. Rep. 169, 69 Pac. 98..	357
Senior et al. v. Anderson et al., 130 Cal. 290, 62 Pac. 563.....	205
Shotwell et al. v. Dodge, 8 Wash. 337, 36 Pac 254.....	57
Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7....	223
Smith et al. v. Hawkins, 110 Cal. 122, 42 Pac. 453.....	163
Southern California Inv. Co. v. Wilshire et al., 144 Cal. 68, 77 Pac. 767.....	15
Tenney v. The Miners' Ditch Co., 7 Cal. 335.....	153
Verdugo etc. et al. v. Verdugo et al., 152 Cal. 655, 93 Pac. 1021..	280
Vernon Irr. Co. v. City of Los Angeles et al., 106 Cal. 237, 39 Pac. 762.....	179
Wells v. Mantes et al., 99 Cal. 583, 34 Pac. 324.....	127
Wood et al. v. Etiwanda Water Co., 147 Cal. 228, 81 Pac. 512.....	167

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WATER RIGHTS

AND

IRRIGATION LAW

IN

CALIFORNIA AND WESTERN STATES.

Rights of Riparian Owners—Reasonable Use.

NOCHOLA FERREA v. MARK KNIPE.

(28 Cal. 341, 87 Am. Dec. 128.)

The plaintiff commenced his action on the eighteenth day of June, 1864, alleging that for eight years then immediately preceding he had been in the possession of a parcel of land consisting of twenty-five acres, through which runs the Sulphur Spring creek in Solano county, which he had used during that time as a garden for raising vegetables for market. That in May, 1856, he constructed a dam upon his land across the creek, and since then had appropriated without hindrance to his own exclusive use for irrigating his garden all the waters of the stream; and he claimed that by reason of his long-continued exclusive use of the water he had acquired a right by prescription to the use thereof to the extent and for the purpose of its original appropriation, and then had the right to the flow of the entire water of the creek, without obstruction, into the reservoir created by his dam, for the benefit of his land, as a right and privilege appurtenant thereto. He then claims that in 1863 the defendant erected a dam across the stream above the plaintiff's dam by which a part of the water was prevented from running down the course of the creek to the plaintiff's land. That in April, 1864, the defendant constructed other dams across the same stream, and that, by reason of the obstruction and diversion

of the water by these dams the plaintiff was deprived of his accustomed use of it, to the great injury of his business and to his great damage, and he then alleges the insolvency of the defendant, and also that if the wrongs of which he complains are continued his business and trade will be wholly ruined.

The object of the action was, first, to recover damages for the injury already sustained; second, to abate the defendant's dams; and third, to obtain an injunction restraining the defendant from obstructing, diminishing, or diverting the waters of the creek from flowing to the plaintiff's dam. . . .

The plaintiff moved for a new trial. The motion was denied. From this decision and the judgment the plaintiff appealed.

CURREY, J.—In 1863, as appears by the finding, the defendant erected a dam across the creek above the plaintiff's dam, by which the natural flow of the stream was obstructed. In April, 1864, he erected two other dams across the same creek above the plaintiff's dam, by means of which several dams the water of the stream was entirely obstructed and prevented from flowing to the dam of the plaintiff, whereby the plaintiff was wholly deprived of the waters of the stream, and his vegetables and fruit growing at the time of the erection and continuance of these dams were injured, to his damage in the sum or two hundred dollars. It further appears by the finding that the object of the defendant in erecting his dams was only to detain sufficient water for his stock, and that he used the same for no other purpose, and that when the action was brought there was not water enough in the creek to flow to the plaintiff's reservoir if no dams had been erected above it.

The evidence in the case shows that the last-named year was one of extreme drought, and that at the time this action was commenced the water of the creek was so reduced in quantity at the place where the defendant had erected his dams (which were more than a mile from plaintiff's land) as to be insufficient to flow over such dams. Every proprietor of lands through or adjoining which a watercourse passes has a right to a reasonable use of the water; but he has no right to so appropriate it as to unnecessarily diminish

the quantity in its natural flow. The use of the water of a stream for domestic purposes and for watering cattle necessarily diminishes the volume of the stream. This is unavoidable, and though by reason of such diminution a proprietor on the stream below fails to receive a supply commensurate with his wants, he is without remedy, because his right subsists subject to the rightful use of the water by his neighbor on the stream above him. But, while admitting that a riparian owner to whom the water first comes in its flow has the right to use it for domestic purposes, and for watering cattle, it is proper to observe that he has not the right to so obstruct the stream as to prevent the running of water substantially as in a state of nature it was accustomed to run. The maxim of the law which he is bound to respect while availing himself of his right is, "*Sic utere tuo ut alienum non laedas.*" (3 Kent, 440; Angell on Watercourses, sec. 195; *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312.)

The court found that by reason of the dams erected by the defendant "the flow of the stream was wholly obstructed, and the waters detained were prevented from flowing to the dam of the plaintiff, and that he was thereby deprived of the use of the same, prior to the commencement of this suit," and "that the plaintiff has sustained damages, by reason of said acts of defendant, in the sum of two hundred dollars." The court also found that the defendant was insolvent and unable to respond to any judgment that might be recovered against him. The court further found that the defendant erected the dams "only to gather sufficient water for watering his stock, and used it for no other purpose," and "that at the time this suit was commenced there was not water enough to flow to plaintiff's pond, had no dams been built."

The fact that the water was so reduced in quantity at the time the action was commenced as to be insufficient to flow to the plaintiff's premises, had the same been unobstructed, was not a circumstance decisive of the case. If before then the creek was wholly unobstructed by the defendant, and the water of the stream was prevented by him from flowing to the plaintiff's land, by reason whereof he was deprived of the use of the water, and thus suffered damages, he had just cause.

of complaint, and was entitled to relief and to the remedy which he sought to prevent the continuance of the injury. Though the defendant had the right to use the stream for watering his cattle and for household purposes, he had not the right, under the circumstances, to dam up the creek and spread out the water over a large surface, by which it would become lost by absorption and evaporation to an extent to prevent the stream from flowing to the plaintiff's premises, as it would have done had it not been for defendant's dams. It cannot be held in this case that the obstruction and diversion of the water of the creek was necessary to the proper and beneficial use of the stream by the defendant, and that as a consequence the injury sustained by the plaintiff was *damnum absque injuria*. The facts found by the court preclude such a conclusion. From the facts found the plaintiff was entitled to judgment, on the ground that he had the right to the water of the creek in the natural flow, subject only to the use thereof by the defendant in a reasonable manner, without unnecessary obstruction or diminution. (Angell on Watercourses, c. 4, and the authorities therein cited.)

The judgment must be and is hereby reversed, and the cause remanded to the court below with directions to enter judgment for the plaintiff.

Use by a Lower Owner not Adverse—Uncertain Judgment.

MRS. T. G. ROGERS et al., Respondents, v. H. OVER-ACKER, Jr., Appellant.

(4 Cal. App. 333, 87 Pac. 1107.)

BUCKLES, J.—This is a suit in equity to enjoin the defendant from diverting certain waters from Conn creek in Napa county. After a trial had the court made findings and entered judgment therein in favor of the plaintiffs. The defendant appeals from the judgment and from an order denying his motion for a new trial.

The complaint alleges that Conn creek has its source in Howell mountain in said Napa county, and runs thence in a

natural defined channel in a southerly direction until it enters Napa creek near the town of Yountville and flows along over the lands of both plaintiffs and defendant a distance of about four miles, and that the lands of defendant are nearer the source of said Conn creek and higher up on the said creek than any of the lands of plaintiffs. That the lands of plaintiffs and defendant have always been used by themselves and their predecessors in interest for stock-raising, grazing and farming, and the waters of said creek have always been used by them for domestic use other than irrigation, until about two years ago, and then only the defendant has at times diverted and claims the right to divert all of the water of said creek so as to flow the same entirely upon his own lands solely for the purpose of irrigation, which diversion is by means of dams erected in said creek, and flumes and ditches leading the water out and upon his said land, and has thus deprived plaintiffs of the use of said water and that there is now no water running in the channel of said creek on or by their lands. That they need said water for their stock and pasturage; that they will suffer irreparable loss unless defendant be enjoined from using said water for irrigation. That defendant has no right, by purchase, prescription or otherwise, to said water other than as a riparian owner, and no right to deprive plaintiffs of the natural flow of the water of said creek in the natural channel thereof.

The answer alleges that defendant, grantors and predecessors in interest have from time to time for many years diverted the waters of said creek for purposes of irrigation at a greater or less extent than the same have been used by him, and that he used the ditches made and used by the grantors. Denies that defendant at any time diverted, or claimed the right to divert, all the waters of said creek, and has never at any time diverted more than one-half of said waters, and that for irrigation, and that he never deprived the plaintiffs of the use of said waters. That when diverted he uses said waters for irrigation and for domestic purposes. Denies that plaintiffs are dependent upon the waters flowing in the channel of said creek for watering their stock and other domestic uses. Denies that he is now diverting, or ever has diverted, the whole of said water, and alleges that he does

and has diverted only a reasonable portion thereof, and alleges that there is water enough flowing in the channel of said creek to supply all the riparian owners along the said creek with ample water for domestic use and their stock and to irrigate more lands than have ever been irrigated by the defendant. Alleges that by reason of the failure of the complaint to show that the waters claimed by plaintiffs are to be used on the lands riparian to said creek, and by reason of the failure of plaintiffs to allege the amount of stock which they claim the right to water from said creek, the defendant is unable to determine the actual amount of water claimed by them. Alleges that the tract of land planted to alfalfa which he diverts the water to irrigate is land belonging to defendant and riparian to said creek and naturally drained into said creek, and that it is necessary to use a reasonable amount of said water to keep the alfalfa growing on his said land so irrigated. There is no averment in either complaint or answer of the amount of water required by either plaintiffs or defendant, nor of the approximate amount of water flowing in said creek. It does appear, however, that from about July 15, 1902 and 1903, to the time when the cool weather comes the water has ceased to flow upon the surface of the channel of said creek at some places below the lands of defendant.

The court finds as matter of fact that all the lands described are riparian to said creek. That all these lands have always been used for stock-raising, grazing and farming, and the waters of said Conn. creek have been used by plaintiffs for domestic purposes and watering stock to a greater or less extent, and the waters of said creek have never been used to any appreciable extent for irrigation until within the years 1902-03. That plaintiffs are dependent upon the water of said creek during the dry season of the year for watering their livestock. That in July, 1902, defendant diverted a considerable portion of the water of said creek out of the channel to and upon his lands through a flume six by eight inches, for purposes of irrigation. Did this again in 1903. That for twenty or thirty years before the diversion of said water by defendant the waters of said creek had flowed upon the lands of plaintiffs, so that during the dry season of the year there was abundance of fresh water in said creek for their domestic

purposes and watering their stock, and that by reason of diverting said waters by defendant for irrigating purposes in the dry season of 1902-03 the plaintiffs were deprived of necessary water for domestic use and watering their stock.

As conclusions of law the court found as follows, to wit:

“The right of plaintiffs to a sufficient flow of water of Conn creek, in the county of Napa, state of California, in the natural channel thereof to and upon the riparian lands of plaintiffs . . . all seasons of the year sufficient to supply plaintiffs with fresh water for their natural wants and usual domestic purposes, including watering of livestock kept or maintained by plaintiffs upon their said riparian lands are primary and paramount rights to the right of defendant to divert or use any of the waters of said Conn creek for the purposes of irrigation. Plaintiffs are entitled to judgment enjoining defendant from so diverting such quantity of the waters of said Conn creek for the purposes of irrigation as will prevent said creek from flowing to and upon the riparian lands of plaintiffs in quantities sufficient to supply plaintiffs with fresh water for their natural wants and usual domestic purposes, including the watering of livestock kept or maintained by them on their said riparian lands.”

The court does not find the amount of water each riparian owner is entitled to, but finds the defendant's diversion and use of said waters for irrigation purposes (one-half or one-third) as shown by defendant's answer and by the evidence is not reasonable, and if continued would cause plaintiffs irreparable injury. The judgment enjoins defendant from diverting the waters of Conn creek from the natural channel thereof upon his lands for the purpose of irrigation at such times or in such quantities or amounts, or in such manner, as will prevent such waters from flowing to and upon the riparian lands of plaintiffs in a sufficient quantity to supply plaintiffs with fresh water for their natural wants and usual domestic purposes, including the watering of livestock kept or maintained by the plaintiffs on their said riparian lands.

All the testimony for the plaintiffs showed that the water ran in the channel of Conn creek in abundance for their use for domestic purposes and for watering their stock for all the years up to 1902, and that during 1902 and 1903 and until

the suit was commenced in September, 1903, the water ceased to run by their lands about July and August of those years, and was not sufficient for all their needs. There was no substantial conflict in the evidence for the plaintiffs. The testimony for the defendant showed that defendant put in his first dam at his place in July, 1902, and during 1902 he took out about one-third of the volume of the water flowing in the said creek. When cutting the alfalfa the water in the flume was allowed to run onto waste land. Irrigated about twelve acres of alfalfa. His flume connected with an old ditch, which he cleared out and which he testified looked like it had twenty years' growth of brush, etc. Never used the water much on other places than alfalfa, but let it run on one place below his cellar and on another place for pasture. He testified: "During July and August the amount flowing in Conn creek gradually lessens, but there is a large flow all summer and as soon as the days begin to get cooler and the nights get longer the water in the creek begins to rise." This testimony applies simply to conditions existing on defendant's land. "All the water that passes my dam and all the water that flows or seeps back from the alfalfa patch flows down Conn creek into the lands of plaintiffs. . . . This irrigated tract . . . is on the northeast side of Conn creek and . . . is riparian to the creek . . . without irrigation it would be impossible to keep the alfalfa alive."

Appellant claims error because the court did not find on certain issues raised by his answer. There is no specific finding as to this allegation in the answer, to wit: "That it is necessary for defendant to use said waters on said land in order to keep the alfalfa growing on said irrigated tract alive, and if said water is not used to a reasonable extent upon said lands, great and irreparable injury will result to this defendant thereby."

If it was not necessary to irrigate the land, then clearly defendant had no right to divert the water of the creek onto it. And if the court's view that the lower riparian owners had the paramount right to all the water flowing in said creek, then this allegation of the answer would become an immaterial allegation and no finding would be necessary thereon. (*Louvall v. Gridley*, 70 Cal. 511, 11 Pac. 777.)

There was no testimony of a prior use by defendant or his predecessors of the waters of said creek for purposes of irrigation except what might be inferred from what defendant said about running the water he diverted into a ditch which had a twenty-year old growth of brush in it, and we think it can hardly be said that this bit of testimony furnished any evidence that defendant's predecessors in interest had ever diverted these waters for purposes of irrigation. The court found as follows: "Before the diversion of water of said creek by defendant for a period of twenty or thirty years the water of said creek had always flowed to and upon the lands of all these plaintiffs, so that during the dry season every year there was maintained on their said premises abundant fresh water for domestic purposes, including the watering of their stock."

Then in its conclusion of law finds: "The rights of plaintiffs to a sufficient flow of water of Conn creek . . . in the natural channel thereof to and upon the riparian lands of plaintiffs . . . in a sufficient quantity at all seasons of the year sufficient to supply plaintiffs with fresh water for their natural wants and usual domestic purposes, including the watering of livestock kept or maintained by plaintiffs upon their said riparian lands are primary and paramount rights to the right of defendant to divert or use any of the waters of said Conn creek for the purposes of irrigation."

If the law is as the court thus finds, then no matter how it may have found as to said allegation the judgment must have been for plaintiffs. But we do not so understand the law. The rule seems to be as laid down in *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442, and *Hargrave v. Cook*, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390. In the first case it was said, approving the latter case, that a lower riparian proprietor cannot acquire a right, either by prior appropriation or by prescription or adverse user, as against an upper riparian proprietor whose rights antedate the appropriation and user, and the mere nonuser of the water by the upper proprietor and his permitting the water to pass down to the lands of the lower owner cannot make the user of the lower owner adverse or strengthen his claim of appropriation or prescription. The complaint alleges no

priority of user of said waters for domestic purposes over the defendant. We do not think the court erred in failing to make a finding of the said allegations.

The plaintiffs were entitled to a judgment restraining the defendant from diverting all the water from said creek for irrigating his said land riparian to said creek.

The plaintiffs having an equal right to take the water, and it being admitted that at times there is abundance of water flowing in the creek to supply their wants and the defendant for irrigating his alfalfa, and plaintiffs claim that at times only enough for the use of plaintiffs, it becomes necessary to know just how much water must flow down said creek to their lands, for they are entitled to just so much and the defendant to so much. A judgment which enjoins the defendant from diverting such waters "for the purpose of irrigation, at such times or in such quantity of amount, or in such manner, as will prevent the waters of said Conn creek from flowing to and upon the riparian lands of plaintiff described in the amended complaint in this action in a sufficient quantity to supply plaintiffs with fresh water for their natural wants and usual domestic purposes, including the watering of livestock kept or maintained by plaintiffs upon their said respective lands," is not a judgment that informs either plaintiffs or defendant just what to do. It must be observed that there is no adjudication whatever as to the amount of water the plaintiffs will need, no mention of the number of stock to be watered, and no means is provided in the judgment by which the defendant can determine just how much water he must let flow down the creek in order that plaintiffs may have their proper and necessary amount of water. The judgment is fatally uncertain, and although it follows the findings, it gives no information as to the quantity of water which is due to plaintiffs. In *Riverside Water Co. v. Sargent*, 112 Cal. 230, 44 Pac. 560, which was an action to determine the relative rights of plaintiffs and defendant to the use of water flowing in the Santa Ana river, the court said: "The decisions of this court establish that in cases like the present the findings and judgment must fix the extent of the superior right, viz., the quantity of water to be allowed to the party whose claim is paramount; otherwise the judgment fails to attain the cer-

tainty necessary to an estoppel upon the main subject of the litigation." . . .

In the case at bar the judgment can never be legally enforced because of its uncertainty as to the amount of water defendant must let pass to the riparian lands of plaintiffs, and it could not be plead as an estoppel (Code Civ. Proc., sec. 1908), because the rights of neither party are fully determined thereby.

There are other errors complained of, mostly in relation to the findings, but as the judgment must be reversed and a new trial had, we will not consider them.

The judgment and order are reversed and the case sent back for a new trial, and it is suggested that the pleadings be so amended that the court upon a new trial may be able to determine specifically the relative rights of the parties.

Use for Irrigation—Form of Relief.

WILLIAM P. HARRIS et al., Respondents, v. A. HARRISON et al., Appellants.

(93 Cal. 676, 29 Pac. 325.)

McFARLAND, J.—This action was brought to quiet plaintiffs' title to the right to the use of certain water, alleged to flow naturally through a stream called Harrison canyon. Judgment was rendered for plaintiffs, and defendants appeal.

Plaintiffs and defendants are the owners of adjoining land, defendants' land lying on Harrison canyon above and to the north of the land of plaintiffs. The real merits of the case—underlying incidental points of pleading and practice—rest upon the issue whether or not there is any watercourse in Harrison canyon. Defendants undertook to maintain by their evidence that the general character of Harrison canyon was that of a dry, sandy gulch, with practically no running water in it, except during great and unusual rainstorms. when temporary torrents bring down large masses of sand and

debris, which fill up the gulch, and so change it that it could not be said to have any well-defined bed or banks; that ordinarily there was no water in the canyon except a little that oozed out of two springs on defendants' land, in quantities too small to form a current strong enough to flow down to plaintiffs' land; and that defendants, by digging into said springs and removing obstructions, developed a small stream, which they use to irrigate their land. Plaintiffs introduced evidence tending to show the contrary of defendants' contention, and tending to prove that there always has been, and is, a natural stream of water running down said canyon to and upon plaintiffs' land, independent of said unusual storms. The judge of the court, with counsel for both parties, and a civil engineer (Finkle), visited the premises and observed the various points alluded to in the testimony. The evidence was certainly very conflicting; and without reviewing it here in detail, it is sufficient to say that its character is such that the finding of the lower court that there was a watercourse as claimed by plaintiffs must be taken as final. . . .

3. The most important question of law involved in the case (although not much argued in the briefs) arises out of the form of the judgment. The court found "that in order that the water of said stream may be made available for the purposes of irrigation to advantage, it is necessary that the full flow of the stream be used at once"; and it was decreed in the judgment that plaintiffs are the owners of and entitled to the full flow of the water every three and a half days out of every seven days, and that the defendants are entitled to such flow for three and a half days out of every seven, and the plaintiffs' title to such flow is quieted. Appellants contend that the above finding and the judgment are outside of the issues made by the pleadings.

Plaintiffs alleged in their complaint that they were entitled to the flow of "all the waters" flowing in Harrison canyon; and defendants, in their answer, denied that plaintiffs were entitled to the flow of any of said waters. The court found and decreed, substantially, that plaintiffs were entitled to the flow of some of said waters, but not of all, and that their right to have the waters of said creek flow down to and upon their

land was subject to the use of said waters by defendants as upper riparian proprietors. Now, a plaintiff in an action to quiet title, or in an action of ejectment, does not lose his case by a failure to establish his title to the whole of the property described in his complaint; he may recover—upon sufficient proof—either a segregated part of the premises sued for, or an undivided interest therein. And so if the judgment in the case at bar had been for a certain part of the continuous flow of the stream, as, for instance, one-half thereof, or a certain number of inches, there could have been no objection to its form. In that event, plaintiff would have simply recovered, in the ordinary way, a part of the property for which he sued. But could the court apportion the use of the water between the parties, as was attempted to be done by the judgment?

According to the common-law doctrine of riparian ownership as generally declared in England and in most of the American states, upon the facts in the case at bar the plaintiffs would be entitled to have the waters of Harrison canyon continue to flow to and upon their land as they were naturally accustomed to flow, without any substantial deterioration in quality or diminution in quantity. But in some of the western and southwestern states and territories, where the year is divided into one wet and one dry season, and irrigation is necessary to successful cultivation of the soil, the doctrine of riparian ownership has by judicial decision been modified, or rather enlarged, so as to include the reasonable use of natural water for irrigating the riparian land, although such use may appreciably diminish the flow down to the lower riparian proprietor. And this must be taken to be the established rule in California, at least, where irrigation is thus necessary. (*Lux v. Haggin*, 69 Cal. 394, 10 Pac. 674.) Of course there will be great difficulty in many cases to determine what is such reasonable use; and “what is such reasonable use is a question of fact, and depends upon the circumstances appearing in each particular case.” (*Lux v. Haggin*, 69 Cal. 394, 10 Pac. 674.) The larger the number of riparian proprietors whose rights are involved, the greater will be the difficulty of adjustment. In such a case, the length of the stream, the

volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each, all these, and many other considerations, must enter the solution of the problem; but one principle is surely established, namely, that no proprietor can absorb all the water of the stream so as to allow none to flow down to his neighbor.

In the case at bar, only the rights of two riparian proprietors are to be considered; none other are involved. And the amount of water in the stream is so small that it is apparent that defendants could not use it for any useful irrigation without practically absorbing it all, and leaving none to flow down to plaintiff's land. There was sufficient evidence to warrant the finding of the court, that in order to irrigate "it is necessary that the full flow of the stream be used at once." But defendants, as well as plaintiffs, were entitled to a reasonable use of the water for irrigation; and the rights of neither could be declared or preserved by an attempted division of the flow of the water without reference to time. The only way, therefore, to preserve those rights, and to render them beneficial, was to decree to the parties the use of the full flow of the stream during alternate periods of time; and we do not see why the court could not decree a division of the use of the water according to that method, when there was no other method by which it could be done. And that the division was a just one and not erroneously determined upon seems clear. The evidence showed that the arable and irrigable land of each party was about equal in area; and there is no contention that the division was not equitable, provided that all the other facts were correctly found by the court.

We see no difficulty in the point that the pleadings do not support the judgment. We see no reason why a court of equity, in a case like this, could not decree such an adjustment of disputed water rights as was decreed in this case upon the ordinary pleadings in an action to quiet title. Upon such pleadings, the rights of the parties to and in the property involved are at issue, and the court has jurisdiction to definitely and finally determine them. The pleadings in this case, however, set up the rights of the parties to irrigate their

respective lands by the use of the water right in litigation, and it is difficult to see what further pleadings were necessary. . . .

Judgment and order affirmed.

Measure of Riparian Rights—Prescriptive Rights—Reasonable Use.

SOUTHERN CALIFORNIA INVESTMENT COMPANY,
Appellant, v. GEORGE WILSHIRE et al., Respondents.

(144 Cal. 68, 77 Pac. 767.)

SHAW, J.—The complaint states a cause of action to quiet the alleged title of plaintiff to the use of all the waters of a certain stream in San Bernardino county known as Edgar creek. The answer denies plaintiff's title and sets forth the title of defendants. The plaintiff appeals from the judgment and from an order denying its motion for a new trial.

Upon the appeal from the order denying the motion for a new trial, the plaintiff assigns as error the insufficiency of the evidence to justify several of the findings. Upon an examination of the record we find that there is sufficient evidence tending to support the respective findings to bring the case within the rule that this court cannot disturb the decision of the court below upon questions of fact depending upon conflicting evidence. The testimony is voluminous and of the character usually given upon contests relating to title by prescription. It would serve no useful purpose to discuss it in detail.

We are of the opinion that the judgment, in certain particulars, is not supported by the findings, and that it must in consequence thereof be modified.

The prayer of the complaint is that all the adverse claims of the defendants, or either of them, to the waters be determined, and that they and each of them be enjoined from asserting any claim to any part of the waters of the stream

adverse to the plaintiff. The defendants allege that they and their predecessors in interest are, and for years have been, the owners of a large body of land situate upon the creek some three or four miles above the land of the plaintiff; that they have the right to use the water thereon as riparian proprietors by reason of the fact that the creek flows through the land described, and that they have the further right to the use of all of said water flowing through their land, for irrigation, domestic use, and the watering of stock upon the said lands by virtue of the appropriation and continuous adverse use thereunder. The complaint does not state the nature of the plaintiff's right to the water, whether by virtue of a riparian right or a prescriptive right. Upon the issues thus presented it was the duty of the court to determine, and in its judgment declare, the extent of the right of the defendants as well as that of the plaintiff.

The court finds that the plaintiff was also the owner of some three hundred and twenty acres of land situated upon the creek, and with respect to the riparian rights in the waters it finds that both the plaintiff and the defendants have the right to use the waters of the stream as riparian proprietors, in proportion to the respective ownership of lands on the stream owned by them respectively, in common with the other owners of land situated along the stream having similar rights, but that these riparian rights, both the plaintiff and defendants, are subject to the prescriptive rights in the water found to be owned by the plaintiff and defendants respectively. It further finds that the plaintiff is the owner and entitled to the use of all that portion of the flow of the creek and of the waters thereof rising and customarily flowing in the creek after the defendants' rights to said stream have been fully satisfied, and not otherwise. This finding, we understand, refers to the plaintiff's right by virtue of appropriation and prescription. With respect to the prescriptive rights of the defendants the court finds that the defendants are the owners of the right to the use of all the surface waters of the creek flowing at the upper boundary of their land, for the purpose of irrigation and domestic use upon said land.

The judgment declares that plaintiff and defendants are riparian proprietors upon the stream, and have, respectively,

the right to use the water of the stream "proportionately to the frontage of their lands upon the said stream, considered with regard to the whole frontage of land upon said stream"; that the defendants are the owners and entitled to the full, free and uninterrupted use and enjoyment of all the surface waters of the creek flowing at their point of diversion near the north line of their lands, that the plaintiff is entitled to all the waters of the stream customarily flowing in the stream at its dam, a short distance above its land, where the ditch begins by which it acquired the prescriptive right referred to in the findings, and that all the rights of the plaintiff in the waters of the stream are subject and subordinate to the prescriptive rights therein adjudged to be owned by the defendants.

The judgment declaring the measure of the respective riparian rights of the parties is not correct. Where two persons own land along the line of a watercourse, the measure of their rights is not necessarily controlled solely by the length of their respective frontages on the stream. Many other things may enter into the question. One may have a tract of land of such character that but little use could be made of the water upon it, while the land of the other may all be so situated that it could be irrigated with profit and advantage. In *Harris v. Harrison*, 93 Cal. 681, 29 Pac. 325, it is said: "In such a case, the length of the stream, the volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each—all these and many other considerations must enter into the solution of the problem." And the general rule is there stated to be, in cases where there is not water enough to supply the wants of both, that each owner has the right to the reasonable use of the water, taking into consideration the rights and necessities of the other.

Upon the findings, with respect to the water rights of the defendants, the court should not have adjudged that the defendants were the absolute and unqualified owners of the right to divert and use all the surface waters of the stream. The owner of a prescriptive right to the waters of a stream has not the unconditional right to change the place of its use at his pleasure. The right to change the place of use is sub-

ject to the qualification that where there are other persons having subordinate rights to the waters of the stream, the right to change the place of use can only be exercised when, and to the extent that, such change will not injure the subordinate right. That portion of the judgment which purports to vest in the defendants the absolute right to divert the water is erroneous, in that it does not limit such right to the use of the water on the land for the benefit of which it was acquired. When the title to water is acquired by adverse use, the extent of the right is limited by the extent of the use which conferred the title. The findings limit this right, as it should be limited, but the judgment goes further and gives an absolute right, the effect of which is that the defendants would have the right to take out the water and make use of it as they see fit, either on the lands within the watershed for the benefit of which it was appropriated, or upon other lands, or for some other use beyond and outside of the watershed. The action was begun in September, 1888. The trial began in June, 1889, but, after the greater part of the evidence was taken, for some reason not appearing, the trial was continued from year to year until June, 1901, when some additional evidence was taken, and thereupon the findings and judgment were made and rendered. From the evidence taken in 1901 it appears that, in 1899, long after the action was begun, one of the defendants, who owned the right to use one-third of the water on a certain portion of the lands described in the answer, attempted to sell his water right to the city of Redlands, and that in pursuance thereof the water which he had theretofore been accustomed to use upon the lands within the watershed had been taken through a pipe, over the divide and beyond the watershed of the creek, some ten or fifteen miles, to the city of Redlands and was there used by the city. This perhaps accounts for the form of the judgment, which, if allowed to stand, would secure to the defendants the right to make this disposition of the water. The court finds that, notwithstanding the diversion of all the water of the creek by the defendants, at their point of diversion, and its use upon their land for irrigation, a part thereof seeped into the soil and percolated through the same until it again reached the stream, and that a portion of this water, thus seeping into the soil,

reached the point of diversion of the plaintiff. From the nature of the soil and the heavy grade of the lands it is manifest that this would be the case. The court further finds that, without the addition to the stream thus caused by the seepage of water used by the defendants, there had always been, from other additions and seepages, sufficient water flowing in the stream at the plaintiff's point of diversion to irrigate all the lands actually cultivated by the plaintiff and its predecessors, which the evidence shows was about twenty-five acres. From this it would appear that the diversion of the water taken by the plaintiff, and the carrying of it beyond the watershed, would not injure the prescriptive right of plaintiff. If no other rights were involved the change of the place of use would be without injury. But the plaintiff has riparian rights in the stream, and this right extends to all the water flowing in the stream through its lands, including that which the defendants allowed to escape, and which seeped into the stream after being used for irrigation, as well as that which flows in the stream in excess of the increase thus received. As such riparian owner, it has the right to have the stream continue to flow through its lands in the accustomed manner, and to use the same to irrigate an additional area thereof, undiminished by any additional or more injurious use or diversion of the water upon the stream above. This right is a part of the estate of the plaintiff—parcel of its land—and whether it is or is not as valuable in a monetary point of view, or as beneficial to the community in general, as would be the use of a like quantity of water in some other place, it cannot be taken by the defendants without right, or, in case of a public use elsewhere, without compensation. It is not necessary in such cases for the plaintiff to show damages, in order that it may be entitled to a judgment. It is enough if it appears that the continuance of the acts of the defendants will deprive it of a right of property, a valuable part of its estate. The taking of the water beyond the watershed would, therefore, be an injury to the plaintiff's riparian right which, under the pleadings and findings in the case, the plaintiff was entitled to have enjoined. The judgment should enjoin the defendants from using the water otherwise than as the court finds, and rightfully adjudges that they are entitled to such

use. They were not entitled to the use of the water except upon the lands described in the answer. The judgment should, therefore, be modified so as to properly describe the respective rights of the parties as riparian owners, and so as to enjoin the defendants from using the water of the creek except upon the lands of the defendants described in the answer, and for the purposes of irrigation and domestic use thereon.

The other alleged errors do not require extended notice. The fact that during the time the defendants were using the water adversely to the plaintiff, the defendants' lands, upon which they were using the water, were vacant government lands, did not make their use the less adverse, nor prevent them from acquiring a right thereby. Any lawful use at any place would be sufficient for that purpose, regardless of the title of the defendants to the land on which it was used. . . .

The judgment, as so modified, and the order denying the motion for a new trial are affirmed.

What Land is Riparian—Land not Abutting Stream Contiguous to Underground Flow—Conveyance—Loss of Riparian Rights.

ANAHEIM UNION WATER COMPANY and SANTA ANA VALLEY IRRIGATION COMPANY, Respondents, v. O. B. FULLER, G. H. FULLER, FRED ZUCKER, and F. J. SMITH, Appellants.

(150 Cal. 327, 88 Pac. 978.)

SHAW, J.—This is an action to enjoin the defendants from diverting the water from the Santa Ana river. Judgment in favor of the plaintiffs as prayed for was given in the court below. The defendants appeal from the judgment and from an order denying their motion for a new trial.

The plaintiffs own lands through which the Santa Ana river flows. They have been accustomed for many years to

irrigate this land with water from the river, and for that purpose there is required during the irrigation season a continuous flow of four hundred miner's inches of water. The defendants, or some of them, own land on the river, situated above the land of the plaintiffs, and upon it they had built a dam in the river and were thereby diverting water from the stream, which, by means of a ditch, they were conducting to other lands owned by them and were there using it for irrigation. The plaintiffs claim, and the court found, that the land which the defendants were thus irrigating with water from the river was not riparian thereto. The sufficiency of the evidence to support this finding, and the question whether or not the plaintiffs' land is entitled to riparian rights in the river, are the principal questions presented upon the appeals.

1. The defendants claim that the land of the plaintiffs lies within, and constitutes a part of, the bed of the stream, and contend that such land is not riparian, nor, as such, entitled to the use of the water of the stream. It appears that the land consists of good soil, capable of producing valuable crops; that it abuts on the river, and that it has been successfully cultivated and irrigated by the plaintiffs and their predecessors for many years. The only facts upon which the claim that it is nonriparian is based are that it forms part of the wide bottom extending between higher lands or bluffs on each side; that the course of the river channel is subject to changes by unusual floods, although no substantial change has occurred for forty years last past, and that the land is all underlaid by an underground flow in contact with and forming a part of the surface stream. We are of the opinion that land, thus situated, is not to be distinguished from other land abutting on the stream, so far as the right of the owner to the reasonable use of the water is concerned. We know of no principle of riparian rights that would except such land from its benefits, nor of any decision to that effect. The opinion in *Ventura L. & P. Co. v. Meiners*, 136 Cal. 284, 89 Am. St. Rep. 128, 68 Pac. 818, contains nothing that can be so construed. It appears to decide that land may be riparian to a stream, although it does not abut thereon except when the stream is swollen by floods. Without conceding the soundness of the decision so far as it seems to decide that the owner of such land may

take water from the stream at its ordinary flow as against other owners whose lands abut upon such ordinary stream, we think it is clear that the discussion in the opinion as to the character of the ground lying between the edge of the stream at its ordinary flow and the line of high water when in flood has no reference to the right of the owner of such intervening land, as a riparian owner, to use the water of the stream for any useful purpose which his position upon the stream enables him to make of it. The land here involved was not at all similar to the land described in the opinion in that case. The case of *Diedrich v. North Western Union Ry. Co.*, 42 Wis. 248, 24 Am. Rep. 399, is not in point. It refers to the rights of the owner of land lying wholly under the bed of a navigable lake, and holds that such owner may not erect wharves or other structures thereon which would interfere with navigation, and that in that respect he has not the right of one owning land along the bank of such lake to erect wharves in aid of navigation for his own use. There is nothing in that opinion to indicate that the owner of land which was under the bed of an ordinary stream might not, by virtue of the position of his land, have such benefit from 'the waters as he could get from it. This question, however, is not involved in the case at bar, for we are of the opinion that the plaintiffs' land was not in the bed of the stream in any proper sense of the term.

2. Some distance below the land of the plaintiffs a tributary known as Chino creek enters the Santa Ana river. Chino creek also has a tributary known as Mill creek, which enters Chino creek one and one-half miles above the confluence of the latter with the Santa Ana river. The defendants take the water from the river, above the land of the plaintiffs, in a ditch which extends across the low bottom to the high land or bluff and then extends along the bluff at a grade less than that of the river, gradually getting farther above and away from the river until it reaches and crosses the divide, or summit of the elevated land, between the river and Mill creek. The court found that the land irrigated with water from this ditch lies beyond this divide and is wholly within the watershed of Mill creek, and that it does not abut upon the stream of the Santa Ana and is not riparian thereto. Land which

is not within the watershed of the river is not riparian thereto, and is not entitled, as riparian land, to the use or benefit of the water from the river, although it may be a part of an entire tract which does extend to the river. . . .

The defendants claim that these findings are contrary to the evidence and that this rule does not apply to the land they seek to irrigate, because, while it is wholly within the Mill creek watershed, it is also within the general watershed of the Santa Ana river, considered as an entirety, including the valley and the slopes leading thereto from its sources to its mouth. This fact does not affect the case, at least so far as the land of the plaintiffs is concerned. The principal reasons for the rule confining riparian rights to that part of lands bordering on the stream which are within the watershed are, that where the water is used on such land it will, after such use, return to the stream, so far as it is not consumed, and that, as the rainfall on such land feeds the stream, the land is, in consequence, entitled, so to speak, to the use of its waters. Where two streams unite, we think the correct rule to be applied, in regard to the riparian rights therein, is that each is to be considered as a separate stream, with regard to lands abutting thereon, above the junction, and that land lying within the watershed of one stream above that point is not to be considered as riparian to the other stream. The fact that the streams are of different size, or that both lie in one general watershed or drainage basin should not affect the rule, nor should it be changed by the additional fact that the two watersheds are separated merely by the summit or crown of a comparatively low tableland, or mesa, as it is called in the evidence, and not by a sharp or well-defined ridge, range of hills, or mountains. The reasons for the rule are the same in either case. In some cases it may be difficult to distinguish the line of separation. This seems to have been a case of that sort. Nevertheless, we think there is evidence sufficient to support the finding of the court that there is a dividing line between the two watersheds and that the land irrigated by defendants lies upon the slope which descends into Mill creek. It is not necessary to discuss this evidence in detail.

The evidence also supports the finding that the land irrigated by the defendants does not abut upon or extend to the

river. If the owner of a tract abutting on a stream conveys to another a part of the land not contiguous to the stream, he thereby cuts off the part so conveyed from all participation in the use of the stream and from riparian rights therein, unless the conveyance declares the contrary. Land thus conveyed and severed from the stream can never regain the riparian right, although it may thereafter be reconveyed to the person who owns the part abutting on the stream, so that the two tracts are again held in one ownership. (*Boehmer v. Big Rock C. I. Dist.*, 117 Cal. 26, 48 Pac. 908; *Alta Land Co. v. Hancock*, 85 Cal. 229, 20 Am. St. Rep. 217, 24 Pac. 645; *Lux v. Haggin*, 69 Cal. 424, 10 Pac. 674; *Watkins L. Co. v. Clements*, 98 Tex. 578, 107 Am. St. Rep. 653, 86 S. W. 738, 70 L. R. A. 964; 2 Farnham on Waters, p. 1572, sec. 463a.) All the land belonging to the defendants, including the Smith tract, which was in part irrigated, was originally a part of the Jurupa Rancho, which abutted upon the river. The original owner of that rancho subdivided it by arbitrary lines, corresponding to the government surveys, and sold and conveyed it in parcels according to that survey. Under the rule above stated, the conveyance by him of a tract not contiguous to the stream would sever such tract from the riparian interest and deprive it of subsequent participation in the use of the water of the river, the right to which previously attached to the entire rancho. The tract which includes the irrigated land of the defendants is not at any point contiguous to the river. At the time the action was begun it was owned by the defendant, Smith. He was not the owner of any adjoining land which lay contiguous to the river. After the action was begun he conveyed this land to certain of the other defendants, some of whom owned adjoining lands extending from the Smith land to the river. This subsequent conveyance gave those defendants a continuous ownership of land extending from the river to and including the Smith land. This contiguous ownership, however, did not confer upon the Smith land the riparian rights of which it was deprived when Smith, or his predecessors, obtained it by a conveyance which severed it from the portion of the Jurupa Rancho abutting upon the river.

It seems to be contended that, for the purpose of determining what lands are riparian, the river is to be considered as

including all the space through which the underground flow extends, as well as that occupied by the surface stream. It is claimed by the appellants, and apparently conceded by the respondents, that the Smith tract at one or two of its angles extends into the low bottom under which the underground water flows or percolates, and upon this circumstance riparian rights are asserted to accrue. It is not necessary here to decide what rights to the use of the underground flow of a stream may, by virtue of its position, attach to land which abuts upon or extends into or over such waters, but does not extend to the surface stream. We are certain that such location of the land, with relation to the stream, does not carry the right to divert water from the surface stream, conduct or transport it across intervening land to the tract thus separated from such surface stream, and there apply it to use on the latter to the injury of lands which abut upon the proper banks of the surface stream, and, hence, that even if the Smith land were all within the watershed, such location upon the underground flow does not justify the diversion the defendants were making from the surface stream for use upon that tract.

3. It is further contended that the plaintiffs' land is in nowise damaged by the diversion complained of, and hence that the diversion cannot be enjoined. Upon this proposition the decisions of this court, and the general principles of law regarding injunctions, are against the theory of the defendants. In *Southern Cal. I. Co. v. Wilshire*, 144 Cal. 68, 77 Pac. 767, speaking of the right of a lower riparian proprietor to enjoin a diversion of a part of the stream for use outside of the watershed of the stream, leaving enough in the stream for any use which had theretofore been made, or was then proposed to be made, by the lower riparian proprietor on his land, the court said: "It is not necessary in such cases, for the plaintiff to show damages, in order that it may be entitled to a judgment. It is enough if it appears that the continuance of the acts of the defendants will deprive it of a right of property, a valuable part of its estate. The taking of the water beyond the watershed would, therefore, be an injury to the plaintiff's riparian right which, under the pleadings and finding in the case, the plaintiff was entitled to have enjoined." . . . In *Vernon I. Co. v. Los Angeles*, 106 Cal. 243,

39 Pac. 762, the plaintiff was not claiming any injury or damage by virtue of his riparian ownership, but was asserting the right to divert water for use upon lands not riparian, against the city of Los Angeles, which was asserting its pueblo right, and what was said in that case with respect to the necessity of showing injury must be taken with the qualifications made evident by the character of the case and by the concurring opinion of Mr. Justice McFarland. The conditions existing in those cases do not exist in the case at bar. The court finds, on sufficient evidence, that the diversion of the defendants, if allowed, would render plaintiffs' land much less fertile and valuable. The defendants do not propose to limit the diversion to times of high water, but, on the contrary, they will take it during the time of its greatest scarcity. There is no question of the diversion of flood water involved in the case. The right which they assert is the right to take the ordinary water of the stream, and hence the doctrine of the Modoc case does not apply.

On this point the defendants cite several cases in which it is held that a lower riparian owner cannot enjoin a diversion by another riparian proprietor above, unless he can show that such diversion works damage to him and that it is more than a just proportion of the water to which the upper owner is entitled. Such decisions are not applicable to this case. Riparian owners have correlative rights in the stream, and neither is a trespasser against the other until he diverts more than his share and injures and damages the other thereby. Here the defendants were not, with respect to the land irrigated, riparian owners, but were trespassers on plaintiffs' property rights from the beginning, and the continuance of the trespass for a sufficient time would divest the right of the plaintiffs with respect to the water diverted. The same distinction exists with respect to cases cited involving the taking of percolating water for use by one owner upon his land, to the detriment of other land over the same saturated plane. The rights in such cases are correlative, and if an injunction can issue at all therein, it can only be when one owner takes more than his due proportion and damage to the other ensues from such excessive taking.

The defendants urge, inasmuch as the plaintiffs need but four hundred inches of water for their land, and there remained in the stream after defendants' diversion more than two thousand inches, which flows down to and beyond the plaintiffs' land, and which is more than they can possibly use thereon, that it therefore follows that no damage can ever ensue, even if the diversion is unlawful and should ripen into a prescriptive right by continuance, and, hence, that their diversion should not be enjoined. The theory of the law of riparian rights in this state is that the water of a stream belongs by a sort of common right to the several riparian owners along the stream, each being entitled to sever his share for use on his riparian land. The fact that a large quantity of water flows down the stream by and beyond the plaintiffs' land does not prove that it goes to waste, nor that the plaintiffs are entitled to take a part of it, as against other riparian owners or users below. Nor can it be said that plaintiffs, on account of the present abundance, could safely permit defendants to acquire, as against them, a right to a part of the water. The riparian right is not lost by disuse, and other riparian owners above may take, or others below may be entitled to take, and may insist upon being allowed to take, all of the stream, excepting only sufficient for the plaintiffs' land. In either alternative, the taking of a part of the water by the defendants would not leave enough for the plaintiffs' use. There is nothing in this case to show how much water is required above and below by those having rights in the stream. In view of the well-known aridity of the climate and the high state of cultivation in the vicinity, the court could almost take judicial notice that in years of ordinary rainfall there is no surplus of water in the stream over that used by the various owners under claim of right. But, however this may be, it is settled by the decisions above cited that a party, situated as the plaintiffs are, can enjoin an unlawful diversion, in order to protect and preserve his riparian right.

The findings support the judgment, and we are unable to perceive any substantial or material conflict in them. We find no error in the record.

The judgment and order are affirmed.

Nonriparian Lands Contiguous to Riparian Lands—Percolating Waters.

F. BOEHMER, Appellant, v. BIG ROCK IRRIGATION DISTRICT et al., Respondents.

(117 Cal. 19, 48 Pac. 908.)

HAYNES, C.—This action is prosecuted by the plaintiff to quiet title to certain water rights alleged to be appurtenant to certain of his lands as riparian owner. The cause was heard upon an agreed statement of facts and the deposition of one witness. Written findings were filed and judgment entered. The defendants moved for a new trial, and upon the hearing thereof the following minute order was made: "Defendants move the court for new trial herein on the grounds stated in the notice of motion on file. Motion is argued and thereupon granted on the grounds stated, and also on the court's own motion for the reason that the findings are contrary to the evidence and were signed and filed inadvertently by the court without observing the error, same having been prepared by counsel for the plaintiff."

This appeal is by the plaintiff from said order. Defendants' motion for a new trial specified three findings as not justified by the evidence. . . .

2. It is also clear that the defendants' exception to the third finding is well taken. The second finding is the plaintiff is seised in fee of a large number of quarter sections therein described by section, township, and range, but not otherwise; and the third finding is that said lands lie along and adjoin natural streams of running water, namely, the Rio Llano, or Big Rock creek, and another stream known as Pallett's creek.

The individuals named as defendants—as to whom the only allegation is that they constitute the board of directors of said irrigation district—disclaimed all interest in the controversy, and the corporation disclaimed all interest in the waters of Pallett creek. The stipulation shows that three of the quarter sections in township 4, range 9 west, do not touch Big Rock creek, though they adjoin other quarter sections owned by plaintiff through which said stream runs; and the same is

true of certain quarter sections in township 4 of range 10 west. The third finding would show, therefore, that all the lands of plaintiff described in the complaint are riparian, and would eliminate the question whether the quarter sections which do not touch the stream are riparian because they are contiguous to other quarter sections through which the stream runs, and which are thus brought within the fourth finding which is that the plaintiff's lands through which the streams run are riparian, and entitles the plaintiff to the reasonable and necessary use of the water therefrom for domestic and irrigation purposes, while said fourth finding clearly limits plaintiff's riparian rights to those quarter sections through which the streams run. . . .

Appellant also contends that his riparian rights extend to those quarter sections not on the stream, inasmuch as they are contiguous to those that are washed by it.

As already seen, the fourth finding obviously intended to limit plaintiff's riparian rights to those descriptions through which the streams run; but this intention was defeated by the third finding, and, the judgment having been entered in accordance therewith, the result is that all of the plaintiff's tracts of land described in the complaint are adjudged to be riparian, except two quarter sections constituting the north half of section 2 in township 4, range 10 west, and there is nothing in the findings to show that these parcels are differently situated.

If appellant's contention as stated in his brief were sound, it would follow that if A owned a tract of land upon a stream, that his riparian rights which he acquired by the purchase of that tract would extend to all lands he might subsequently acquire, no matter from whom nor under what circumstances his vendor obtained title, nor how distant from the stream, provided he owned all the land between the stream and the land so purchased.

The facts stipulated are, however, that all the lands described in the complaint, except the northeast quarter of section 7, township 4 north, range 9 west, and two quarter sections in range 10, were patented by the United States to William S. Chapman on June 1, 1870, by fourteen separate patents based on fourteen different entries, and that plaintiff

is the owner of each of these fourteen quarter sections "by mesne conveyances under said William S. Chapman."

With exception of lands within confirmed Mexican grants, the Virginia military reservation and perhaps some other reservations granted in the early days, it has been the policy of the general government to subdivide the public domain into small tracts, and to dispose of them as such, and for the purpose of carrying out such policy restricted the right of entry under the homestead and pre-emption laws to one hundred and sixty acres. Even in its grants to railroads, by granting alternate sections, it prevented the acquisition from the government of large bodies of contiguous lands, and a similar policy is pursued by the state in disposing of state lands.

In *Lux v. Haggin*, 69 Cal. 255 (10 Pac. 674), at pages 424, 425, it was said: "It is to be borne in mind that if the court had found a watercourse to, through or past any one of the tracts described in the complaint, only such of the certificates of purchase would have been admissible as showed the purchase of tracts so found by the court to be touched or traversed by the watercourse. . . . If we shall say in general terms that the certificates of purchase ought to have been admitted, this must be understood in a limited sense, and to apply only to the certificates with reference to the land described, as to which there is evidence that they are lands by or through which the watercourse passed. All the sections or fractional sections mentioned in any one certificate constitute a single tract of land." . . .

It is alleged in the answer that said irrigation district "is a municipal corporation, and is not subject to be sued in this action," and we are asked by respondent to adjudicate that question.

It is true, as appellant suggests, that it cannot be considered as affecting the order appealed from; but as that order must be affirmed, and as the question must again arise, unless abandoned by the defendant corporation, it should be disposed of now so as to avoid another appeal.

We are not referred to any case where this question has been raised or decided. The fact that it has not been before made, while by no means conclusive, is suggestive of the construction given to the statute by the bar.

Section 14 of the "Wright Act" (Stats. 1887, p. 35), after giving express authority to the board of directors "to institute and maintain any and all actions and proceedings, suits at law or in equity, necessary or proper in order to fully carry out the provisions of this act, or to enforce, maintain, protect or preserve any and all rights, privileges and immunities, created by this act, or acquired in pursuance thereof," adds: "And in all courts, actions, suits or proceedings, the said board may sue, appear and defend, in person or by attorneys, and in the name of such irrigation district."

This language is quite as effective to subject the district to an action as the more common expression "to sue and be sued."

"Appearance" is defined by Bouvier to be "a coming into court as a party to a suit, whether as plaintiff or defendant; the formal proceeding by which a defendant submits himself to the jurisdiction of the court"; while the word "defend" is defined in Black's Law Dictionary as follows: "To contest and endeavor to defeat a claim or demand made against one in a court of justice."

It is conceded that the state and its public agencies cannot be sued without express authority from the state itself, and that, as held in the *matter of the bonds of the Madera Irr. Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106, 28 Pac. 272, 675, 14 L. R. A. 755, "An irrigation district organized under the Wright Act becomes a public corporation, and its officers become public officers of the state."

Undoubtedly a general statute authorizing individuals or private corporations to sue or be sued would not be construed to include municipal corporations; but where, as here, the statute in question relates directly and exclusively to corporations formed under it, that part relating to its liability to sue or be sued must be determined by those rules of construction intended to aid in ascertaining the intention of the legislature, for whatever power it does bestow is granted directly and expressly to such corporation.

If such corporations may not be sued, no judgment can be rendered against them whether they appear and defend or not, and certainly the legislature did not intend that such actions

should be profitless to the parties and only profitable to the attorneys, and perhaps not even amusing to the court. The right to appear and defend implies the liability to be sued.

The order appealed from should be affirmed.

What Land is Riparian—Material Injury Necessary to Injunction.

JONES et al. v. CONN.

(39 Or. 30, 87 Am. St. Rep. 634, 64 Pac. 855, 54 L. R. A. 630.)

Action by George Jones and others against George Conn. From a decree enjoining defendant from taking water from the ditch in controversy for irrigation purposes so as to materially affect plaintiffs' rights as lower riparian owners, both parties appeal. Affirmed.

This is a suit to enjoin the defendant, Conn, from diverting the waters of Chewaucan river through a ditch recently constructed by him. The plaintiffs are riparian proprietors on the river, and the owners in severalty of divers tracts of arid land, aggregating several thousand acres. These lands are level, and, when irrigated, very fertile, but valueless without. The defendant is an upper riparian proprietor, owning eight hundred and seventy-five acres, through which the river flows a distance of one and three-fourths to two miles, dividing on his premises into two main channels, flowing northeasterly and southeasterly, which in turn subdivide into numerous channels and sloughs, through each of which the waters of the river have been wont to flow from time immemorial. The greater portion of defendant's land is elevated from seventy-five to eighty feet above the river. Three hundred and twenty acres of it are contiguous to, but acquired by different conveyances from, land immediately bordering on the stream. In the fall of 1896 and spring of 1897 the defendant constructed the ditch in question for the purpose of irrigating his upland, and furnishing better power to a grist mill, situated on the river a short distance below its forks, which he had theretofore

owned and operated with water conveyed through a ditch about half a mile long, located on his own premises. The new ditch taps the river one and one-half or two miles above his property, and has a carrying capacity of about two thousand five hundred inches. The upland he proposes to so irrigate is somewhat lower than the bluff between it and the river, and slopes slightly away therefrom, so that it is contended that any water used thereon for irrigation cannot find its way by percolation back into the river. The object of this suit is to enjoin the defendant from using water through this ditch, on the theory that it is a wasteful and unnecessary means of supplying power to his mill, and that the land he proposes to irrigate is nonriparian. The defendant avers that all his lands are riparian, and that, as a riparian proprietor, he is entitled to two thousand six hundred and seventy-five inches of water for domestic, stock, irrigating, and manufacturing purposes; that all of his land is arid, and capable of being irrigated from the river, which carries a large amount of water during the irrigating season; that the amount he proposes to take and consume therefrom is reasonably necessary for the purposes indicated, and will not be of any material injury to the plaintiffs, or any of them. The court below found that the defendant was entitled to take water through the ditch in question, but not to use it for the irrigation of lands contiguous to, but acquired by different conveyances from, land abutting directly on the stream, when such use will actually and sensibly affect the rights of the plaintiffs as riparian proprietors, and entered a decree perpetually enjoining and restraining him from diverting any of the waters of the river to irrigate such land, "to the actual and perceptible injury of the plaintiffs as riparian proprietors upon their riparian lands." From this decree both parties appeal.

BEAN, C. J. (after stating the facts).—This is a controversy between riparian proprietors upon a natural water-course. There is virtually but one question involved in the case, and that is whether the lands which the defendant seeks to irrigate are riparian in character. It is practically conceded that upon the commencement of the suit the plaintiffs had not been substantially injured or damaged on account of

the use of the water by the defendant, and, as a consequence, are not entitled to an injunction if the lands are riparian; but the contention is that they are nonriparian, and therefore the plaintiffs are entitled to an injunction restraining the use of the water thereon without proof of damage. It is common learning that every person through whose premises a stream of water flows has a right to its use and enjoyment as it passes through his land; but, as all other proprietors have a similar right, it necessarily follows that one cannot use or divert the water to the injury of another. The right of each must be exercised in subordination to that of all the others. Within these limits, each proprietor is entitled to such use of the stream as may be conformable to the usages and wants of the community. It is often said that a riparian proprietor has a right, inseparably annexed to the soil, to have the water of a stream flow down to his land as it is wont to run, undiminished in quantity and unimpaired in quality; and that, if an upper proprietor takes it from the stream, he must return substantially the same quantity again before it leaves his premises. This rule, however, is subject to the limitation now well established that each proprietor is entitled to a reasonable use of the water for domestic, agricultural, and manufacturing purposes, and such use is not to be denied him on account of the loss necessarily consequent upon its proper enjoyment. In short, he has a right, in the language of Vice-Chancellor Bacon in *Earl of Sandwich v. Great Northern Ry. Co.*, L. R. 10 Ch. D. 707, 712, "to make all the use he can—to derive every benefit he can—from the stream, provided he does not abstract so much as prevents other people from having equal enjoyment with himself"; or, as said by Lord Kingsdown in *Miner v. Gilmour*, 12 Moore P. C. 131, 156: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he

does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury." The right of a riparian proprietor to the use of the water of a stream flowing through his premises, and its limitations, are well expressed in a Maryland case, where the court say: "The right of every riparian owner to the enjoyment of a stream of running water in its natural state in flow, quantity, and quality is too well established to require the citation of authorities. It is a right incident and appurtenant to the ownership of the land itself, and, being a common right, it follows that every proprietor is bound so to use the common right as not to interfere with an equally beneficial enjoyment of it by others. This is the necessary result of the equality of right among all the proprietors of that which is common to all. As such owner, he has the right to insist that the stream shall continue to run *uti currere solebat*; that it shall continue to flow through his land in its usual quantity, at its natural place, and at its usual height. Without a grant, either express or implied, no proprietor has the right to obstruct, diminish, or accelerate the impelling force of a stream of running water. Of course, we are not to be understood as meaning there can be no diminution or increase of the flow whatever, for that would be to deny any valuable use of it. There may be, and there must be allowed to all of that which is common, a reasonable use; and such a use, although it may, to some extent, diminish the quantity, or affect, in a measure, the flow of the stream, is perfectly consistent with the common right. The limits which separate the lawful from the unlawful use of a stream it may be difficult to define. It is, in fact, impossible to lay down a precise rule to cover all cases, and the question must be determined in each case, taking into consideration the size of the stream, the velocity of the current, the nature of the banks, the character of the soil and a variety of other facts. It is entirely a question of degree,

the true test being whether the use is of such a character as to affect materially the equally beneficial use of the stream by others." . . .

For the protection of the rights of the several riparian proprietors it has even been held that a court of equity may in a proper case apportion the flow of the stream, after the natural wants of the several proprietors have been satisfied, in such a manner as may seem equitable and just under the circumstances. . . .

The plaintiffs admit the rule that, after the natural wants of all the riparian proprietors have been supplied, each is entitled to a reasonable use of the water for irrigating purposes, but insist that the exercise of the right must be limited to the tract of land through which the stream flows as first segregated and sold by the government of the United States, and that, even in such a case, where there are unnatural barriers within the tract which would prevent a portion of the land from deriving any benefit from the flow of the stream, the portion lying beyond the barrier should be excluded. But, as we understand the law, lands bordering on a stream are riparian, with regard to their extent. After a considerable search, we are unable to find any rule determining when part of an entire tract owned by one person ceases to be riparian. The discussions in the books are restricted to a definition of riparian proprietors and their respective rights. A riparian proprietor is one whose land is bounded by a natural stream, or through whose land it flows, and riparian rights are those which he has to the use of the water of the stream. They are derived entirely from the ownership of the land, and not from its area or the source of its title. . . .

The right to use the water belongs to the owner of the land, and the extent of its exercise is not to be determined by the area or contour of his land, but by its effect upon other riparian proprietors.

A reference to a few of the adjudged cases will illustrate this principle. In *Norbury v. Kitchin*, 9 Jur. (N. S.) 132, the defendant, a riparian proprietor, erected pumps and conduit pipes to conduct the water of a stream across a hill into a reservoir, to await the use of a house built by him on prop-

erty he had acquired subsequently to his riparian property. It was held that the question whether his use of the stream was reasonable under all the circumstances was properly left to the jury. In one of the opinions it is said: "The defendant has built himself a house on the side of a hill, and he formed a reservoir to supply his house with water from the stream. This exercise of his right seemed somewhat strong, and the plaintiff's counsel were at one time inclined to rely upon the distance of the house from the stream, but probably, on reflection, they found it immaterial. The real question in the case is whether a man who has three hundred and twenty-one thousand gallons of water coming down to him, can complain if ten thousand are taken before." *Elliot v. Railroad Co.*, 10 Cush. 191, was an action to recover damages for the diversion of water by a railroad company, an upper proprietor, for the use of its locomotives, engines, and other similar purposes. It was contended at the trial that, if the jury were satisfied of the existence of the stream and the diversion of the water by the defendant, plaintiff was entitled to a verdict for nominal damage, without proof of actual damage; but the presiding judge instructed the jury that, unless plaintiff suffered actual perceptible damage in consequence of the diversion, the defendant was not liable in the action, and this direction was held to be right by the entire court. In the course of the opinion, Mr. Chief Justice Shaw says: "The right to flowing water is now well settled to be a right incident to property in the land. It is a right *publici juris*, of such character that, whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of providence, each proprietor has a right to a just and reasonable use of it, as it passes through his land; and, so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use may often be a difficult question, depending on various circumstances. To take a quantity of water from a large running stream for agriculture or manufacturing purposes would cause no sensible or practicable diminution

of the benefit to the prejudice of a lower proprietor; whereas taking the same quantity from a small running brook passing through many farms would be of great and manifest injury to those below, who need it for domestic supply, or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case, and not in the former. It is, therefore, to a considerable extent, a question of degree. Still, the rule is the same, that each proprietor has a right to a reasonable use of it, for his own benefit, for domestic use, and for manufacturing and agricultural purposes." In *Garwood v. New York etc. R. R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452, a riparian proprietor was allowed to maintain an action to recover damages against a railroad company for diverting the waters of a stream and conveying them by pipes to reservoirs, where its locomotives were supplied with water, the proof showing that the water so diverted was sufficient "to perceptibly reduce the volume of water" in the stream, and to "materially reduce or diminish the grinding power of plaintiff's mill," in consequence of which he sustained damage to a substantial amount. In *Gillis v. Chase*, 67 N. H. 161, 68 Am. St. Rep. 645, 31 Atl. 18, it is held that a riparian owner is not liable for a reasonable use of water passing his land, whether for his own purposes or for sale to others, and the reasonableness of his use is a question of fact. In this case it is said: "Each riparian proprietor having the right to a just and reasonable use of the water as it passes through and along his land, it is only when he transcends his right by an unreasonable and unauthorized use of it that an action will lie against him by another proprietor whose common and equal right to the flow and enjoyment of the water is thereby injuriously affected. And as the reasonableness of the use is, to a considerable extent, a question of degree, and largely dependent on the circumstances of each case, it is to be judged of by the jury, and must be determined at the trial term as a mixed question of law and fact." In *Fifield v. Spring Valley Waterworks*, 130 Cal. 552, 62 Pac. 1054, it was held by the supreme court of California that a lower riparian proprietor, who is not injured by the diversion of water by a corporation conducting and carrying on the business of supplying the

inhabitants of a city with water, cannot restrain such diversion. In *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72, 6 South. 78, 4 L. R. A. 572, a riparian proprietor filed a bill to enjoin the diversion of water from the stream by an upper riparian proprietor, a water company, for the use of its waterworks, constructed to supply the inhabitants of a city with water. The testimony in the case established that the diversion of water for the purpose mentioned would result in a sensible diminution in the flow of the stream itself in the dry season or summer months, but that the complainant was making no particular use of the stream, and therefore suffered no special damage by the act of the defendant; and it was held that, as the defendant was taking the water for the purpose of supplying the wants of a neighboring town, and not returning it to its natural channel, the plaintiff was entitled to an injunction in vindication of his rights, without any special proof of damages; but, as he was not making any particular use of the water, the injunction should be so framed as only to restrain its use "to the sensible injury or damage of the complainant for any purpose for which he may now or in the future have use for it."

It is apparent, therefore, that the rule, so often stated and reiterated in the books, that a riparian proprietor is entitled to have the entire flow of the stream come down to his premises, is subject to the important limitation that an upper riparian proprietor may make such a use thereof as does not work any actual, material, and substantial damage to the common right which each proprietor has; and, whether a proposed use is of the character referred to, and therefore reasonable, does not depend so much upon the area of the land of the offending proprietor, or the place of the use, as upon the effect it has upon the correlative rights of the other proprietors. Under this doctrine the defendant was not a wrongdoer when he used the waters of the stream for the purpose of irrigation, nor does the fact that his land lies above the level thereof, so that it cannot be irrigated by means of ditches wholly on his own premises, affect his right to the use of the water (*Charnock v. Higuerra*, 111 Cal. 473, 52 Am. St. Rep. 195, 44 Pac. 171, 32 L. R. A. 190), although it might have a material bearing upon the reasonableness of the use, if that

question was here for decision. (Gould on Waters, 3d ed., sec. 217.) But there is no reason shown by this record why the defendant should be confined in the use of the water to any particular portion of his land. The amount of water taken and used by him before the trial was not sufficient to materially injure the plaintiffs, or to interfere in any substantial way with their rights as riparian proprietors. There seems to have been abundant water left in the stream after his diversion for the use of all the other riparian proprietors. There is some conflict in the authorities as to whether a riparian proprietor can enjoin the use of water for the irrigation of nonriparian lands without showing damage (*Modoc etc. Livestock Co. v. Booth*, 102 Cal. 151, 36 Pac. 431; *Gould v. Eaton*, 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 181; *Fifield v. Spring Valley Waterworks, supra*); but it is clear that a court of equity will not restrain the use of water by a riparian proprietor to irrigate his lands unless it is shown that such use will injure the other riparian proprietors. (Gould on Waters, 3d ed., sec. 214.) The plaintiffs, therefore, were not entitled to an injunction restraining the defendant from using the waters of the stream for the purpose of irrigation, because such use was no injury to them. But, as the defendant has set up in his answer, and attempted to maintain by his testimony, the absolute right to sufficient water to irrigate his land, regardless of the effect it may have upon the other proprietors, the plaintiffs are entitled to such a decree as will prevent his use from ripening into an adverse title. (Gould on Waters, 3d ed., p. 214; *Kin. Irr.*, p. 329; *Ulbricht v. Water Co., supra*; *Newhall v. Irenson*, 8 Cush. 595, 54 Am. Dec. 790.)

It is suggested that the court ought to ascertain and determine the rights of the respective parties, and fix them in the decree, so that hereafter there may be no controversy concerning the matter. In the very nature of things, however, it is impossible in a case of this character to make such a decree. The rights of the several riparian proprietors are equal, each being entitled to but a reasonable use of the water for irrigating purposes, and what constitutes such use must necessarily depend upon the season, the volume of water in the stream, the area and character of the land which each

riparian proprietor proposes to irrigate, and many other circumstances; so that it seems to us there is no basis upon which the court could frame any other decree than one enjoining and restraining the defendant from diverting the water from the stream to the substantial injury of the present or future rights of the plaintiffs, and, as the decree of the court below is to that effect, it will be affirmed.

Riparian Rights—Severance from Land—Irrigation—Grant of Riparian Rights.

FRED S. GOULD, Respondent, v. O. A. STAFFORD, Appellant.

(91 Cal. 146, 27 Pac. 543.)

VANCLIEF, C.—Action for damages resulting from the alleged diversion of water by defendant from Montecito creek, in the county of Santa Barbara, and for a perpetual injunction against such diversion in the future. Both parties claim to be riparian proprietors upon both sides of the creek, the defendant's land being about one mile above that of the plaintiff.

The complaint charges that in January, 1882, by means of a dam across a main branch of the creek (the Cold Spring branch), and certain flumes and ditches erected and maintained by the defendant, he "prevented a portion of the waters naturally flowing in said creek from flowing down to and reaching plaintiff's land and premises; that defendant wrongfully and unlawfully has continuously since said time appropriated and taken for his own use a large portion of the waters naturally flowing in said stream as aforesaid, and has wasted said water and applied the same to unlawful purposes, and prevented the entire quantity so taken from again returning to the natural bed or channel of said Montecito creek or any of its branches, and said waters have, by means of said unlawful diversion, been wasted and lost, and have not reached the land of plaintiff"; whereby plaintiff's

land has been deprived of the flow of the water and of the use thereof for necessary or any purposes, and in the seasons of scarcity of water the bed of said creek, within the premises of plaintiff, has become dry for a long period, and plaintiff has been deprived of the use of any water of said creek for domestic or other reasonable and lawful uses, to the damage of plaintiff in the sum of five thousand dollars, and that defendant threatens to continue, and unless restrained will continue, such unlawful diversion to the lasting and irreparable injury of plaintiff and his land.

The amended answer of the defendant, on which the case was tried, denies that the waters of said creek naturally flow through plaintiff's land later than the month of June, except in extraordinarily wet seasons, and specifically denies all the wrongful acts charged in the complaint.

The answer alleges the defendant's riparian ownership of land as above stated, and that on November 19, 1881, the defendant leased to Ah Young, a Chinaman, a part of his riparian land on the west side of the creek, and sets out the lease as follows:

"Agreement in consideration of the sum of one hundred dollars (\$100) per annum, to be paid semi-annually in advance. I agree to lease to Ah Young my field of eight (8) acres, more or less, lying on the west side of Cold Spring Creek, formerly known as the Sanchez land, for the term of five (5) years from date of this agreement; I furthermore agree to build a six-inch flume to carry water from the creek to the land, he, Ah Young, agreeing to keep said flume and the fence now about the land in good repair as they are at present.

(Chinese mark) "O. A. STAFFORD.
"AH YOUNG.

"Montecito, S. B. Co., Cal., November 9, 1881."

The answer further alleges that defendant did not agree to furnish the lessee any particular quantity of water, or any water, except such as the lessee was entitled to by the terms of the lease, viz., so much as was appurtenant to the land leased by reason of its being riparian to the creek; that Ah Young took possession of the leased premises on Novem-

ber 9, 1881, and he and his assigns continued to occupy the premises under the lease until November 9, 1886.

It is also alleged in the answer "that no notice was given to defendant before the commencement of this action to abate any dam in said creek, or that the waters of said creek which flowed into said flume were being or had been wasted or misapplied."

As to the alleged riparian ownership of defendant, and the lease and possession of the lessee under it, the court found the answer to be true. As to the alleged want of notice to defendant there is no finding. As to damages, the plaintiff withdrew all claim except for nominal damages, and the court found only nominal damages. But upon all other material issues the court found for the plaintiff, and gave judgment against defendant for nominal damages, and costs assessed at \$263.60, and perpetually enjoined and commanded him, substantially as follows:

1. From wasting, or permitting to be wasted, any portion of the waters of said creek or the branches thereof;

2. From diverting or using, or permitting to be diverted or used, any of said waters upon any other land than the riparian land of the defendant;

3. From diverting, or permitting to be diverted, for the purposes of irrigation, all the waters of said creek or any of its branches, "at any season of the year for purposes of irrigation, and from interrupting or interfering with the said supply of water so enjoyed by the plaintiff for domestic and household purposes, and for watering his stock, and from permitting the same to continue unrestored, and from permitting to continue on his land or at the dam erected by him any means or appliances whereby the said uses of plaintiff therein are or may be diverted or interfered with."

4. In case the defendant should divert and use a portion of the waters of said stream for the purpose of irrigating his riparian land, he is commanded, by "substantial and proper artificial means and methods," to conduct back to the channel of the creek, above the lands of plaintiff, all surplus water not necessary for irrigation and not being used therefor, so that the same may be restored to the natural channel above the lands of plaintiff without waste or unnecessary diminution.

5. It is adjudged that the use, by the defendant, of the waters of said stream for the purpose of irrigation is subordinate to the right of the plaintiff to use the same for domestic and household purposes and the watering of stock.

The case was here on a former appeal (77 Cal. 66, 18 Pac. 879), but the questions now presented are different from those decided on the former appeal.

The defendant appeals from the judgment, and also from an order denying his motion for new trial.

1. The appellant contends that the evidence does not justify the finding that the defendant by any means diverted, misapplied, or wasted any water from the Cold Spring branch of the creek; or that he caused, authorized, or promoted any such misapplication or waste by others.

The evidence tends to prove no other wrongful or excessive diversion than that from the Cold Spring branch through the flume to the garden leased to Ah Young; and the only evidence claimed to have any tendency to prove that defendant caused or authorized such diversion, or any waste or misapplication of the water, is, that he executed the lease to Ah Young, and constructed the flume, according to the terms of the lease; and also that he employed one Chico to construct the flume and agreed that Chico should have a partial use of the flume, to convey water to his land, situate below the Chinese garden, in consideration of his work upon the flume. The flume tapped the stream above defendant's land, and defendant acquired the right of way for it upon the land of others. There never was any permanent dam across the stream to divert the water into the flume. In the early part of each season, when the stream carried a large quantity of water, very little, if any, obstruction was required to turn sufficient water into the flume to fill it. A few rocks thrown into the stream were then sufficient to turn water into the flume to its full capacity. Later in the season, as the water in the stream diminished, the obstruction was increased until the lowest stage of the water, when a dam composed of stones, brush, and mud was extended entirely across the stream. This dam was washed away in the winter or spring of each year.

The defendant testified that the dam, and obstructions by which the water was turned into the ditch, were annually con-

structed by the lessee of the Chinese garden and Chico; and that he (defendant) neither assisted in their construction nor directed or advised as to the manner or extent thereof, nor as to the quantity of water to be diverted thereby. This testimony is corroborated by that of other witnesses, and there is no evidence to the contrary. Nor is there any evidence tending to prove that Chico was the agent or servant of the defendant for any other purpose than the construction of the flume, or that defendant ever controlled, aided, or advised Chico in regard to diverting or using the water of the stream. It appears that Chico extended the flume from the Chinese garden to his place lower down the creek, where he irrigated a strawberry-bed and an orchard of pear trees; but there is no evidence tending to prove whether or not he owned the land thus occupied and irrigated by him, or whether it was riparian to the creek, or how much water he used. Upon cross-examination of Packard, the principal witness for plaintiff, defendant's counsel asked him: What proportion of the water flowed into the flume that Chico used? This question was objected to by plaintiff's counsel as irrelevant and immaterial, and the court sustained the objection. The defendant also testified that he was never notified before the commencement of this action that more water was being diverted by means of the dam and flume than his lessee and Chico were entitled to divert, nor that the water diverted by them was misapplied or wasted, and his testimony in this respect was not disputed.

There is no question that the Chinese garden was riparian to the creek, and that the owner thereof, or his lessee, was entitled to such reasonable use of the waters of the creek to irrigate the same as was consistent with the rights of other riparian owners. The evidence shows that the quantity of water that might be so used at any given time depended upon the stage of the water in the creek, which varied in different years as well as at different seasons of the same year. It follows that defendant had a perfect right to construct a flume to convey water from the stream to his land, for his own use or for the use of his lessee, of sufficient capacity to carry all the water that he or his lessee might be entitled to use at any season of any year. The mere capacity of the flume did not

concern other riparian owners, as they could object to only an unlawful or excessive use of it. The flume was not a nuisance *per se*; and after the defendant leased it, he had no more power or right to control the use of it by the lessee, than he had to control the use of the land and other fixtures leased. The lessee alone was responsible for his wrongful use of it by which others were injured. "A landlord is not responsible to other parties for the misconduct or injurious acts of his tenants to whom his estate has been leased for a lawful and proper purpose, when there is no nuisance or illegal structure upon it at the time of the lease. (*Kalis v. Shattuck*, 69 Cal. 593, 58 Am. St. Rep. 568, 11 Pac. 346, and authorities cited.) The relation of Chico to the defendant, after the flume was constructed, was either that of lessee or licensee of the flume alone, in consideration of his labor in constructing it; and since the defendant neither authorized nor participated in a wrongful use of the flume by Chico, he was not liable, unless the lease or license contemplated or necessarily involved a nuisance or wrongful use. (*Gwathney v. Little Miami R. R. Co.*, 12 Ohio St. 92; Wood on Landlord and Tenant, sec. 539.) As the flume was not a nuisance *per se*, and was, unquestionably, adapted to a lawful use, there can be no presumption against the defendant, in the absence of evidence that he intended or contemplated an unlawful use of it by his lessee or licensee.

For the reasons above stated, I think the finding under consideration is not justified by the evidence.

2. Appellant's counsel further contends that the twelfth finding is not justified by the evidence. That finding is to the effect that, by the diversions of the waters complained of, "the plaintiff has suffered material damage, and the rights of plaintiff as a riparian proprietor have been infringed and injured, and are threatened with further irreparable injury, as far as said riparian rights are concerned."

In support of this point it is claimed that the evidence shows that plaintiff had no riparian rights that could have been infringed or injured; that prior to plaintiff's purchase of the land described in his complaint as to which he claims riparian rights, his grantors had granted to Montecito

Water Company (a California corporation) all riparian rights to water appurtenant to or parcel of said land, in consideration of certain shares of stock in that corporation, which shares of stock entitled the holder thereof to a certain quantity of water in proportion to the number of shares, to be conveyed to the land through pipes or aqueducts by the corporation; and that, during the time that defendant is alleged to have diverted water from the creek, the Montecito Water Company, by virtue of that grant, was diverting water from the same stream, and conveying such portion of it to plaintiff's land as plaintiff was entitled to in consideration of the grant.

To prove this alleged grant, the defendant put in evidence a long and complicated written agreement between riparian proprietors on the creek (twenty-three in number, including plaintiff's grantors), of the first part, and the Montecito Water Company, of the second part. Among other things, this agreement purports to be a grant by the parties of the first part to the Montecito Water Company of all the rights of the grantors to the waters of the creek for the consideration above stated.

In addition to this, the evidence tended to prove that the plaintiff regarded the agreement as valid and binding upon him; that as successor to his vendors he had applied to the corporation to have their stock transferred to him, and that it had been so transferred on the books of the corporation; and that he had received on his land water from the corporation, for domestic and other uses, during the time he complains of having been deprived of water by the defendant; but whether, during all that time, he received from the corporation as much water as he was entitled to by the agreement does not clearly appear.

The agreement purports to be a substitute for a lost agreement, to which it refers, and in some undefined respects to be different from the lost agreement; besides, it is not clear that all the parties to the lost agreement are parties to the substituted agreement. It is also quite apparent upon the face of the agreement that in order to construe it and determine its effect, if any effect it can have in this action, it will be necessary to consider the circumstances under which it was exe-

cuted, and the acts of the parties under it, of which there was not sufficient evidence upon the trial. (Gould on Waters, sec. 319.)

In view of the record here, I think it cannot be said that the evidence does not justify the finding that the plaintiff has riparian rights which were infringed by the diversions of water complained of, or that the court improperly declined to give to the agreement above referred to, as presented on the trial, the effect claimed for it by counsel for appellant, although it may turn out, upon a proper construction of that agreement (which is not attempted here), in the light of all the circumstances which may be lawfully considered as aids to such construction, that the agreement may have the effect claimed for it by counsel for appellant; and for the purposes of a new trial, which must be granted upon other grounds, it is proper to pass upon some of the questions of law discussed by counsel relating to the grant of riparian water rights, and the effect thereof.

The right of a riparian proprietor to the flow of a stream of water over his land is an incident of his property in the land, is annexed to the land, and considered part and parcel of it (Civ. Code, sec. 662; *St. Helena Water Co. v. Forbes*, 62 Cal. 182, 45 Am. Rep. 659), but may be severed or "segregated" from the land by grant, by condemnation, or by prescription. (*Alta Land & Water Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645; *Alhambra etc. Water Co. v. Mayberry*, 88 Cal. 69, 25 Pac. 1101; Washburn on Easements, 12, 385; Angell on Watercourses, secs. 96, 141, 146.) If, therefore, the grantors of the plaintiff, while they owned the land, granted to the corporation (Montecito Water Company), "its successors and assigns," all or any portion of their riparian rights to the waters of Montecito creek, they thereby, to the extent of such grant, severed from the land their riparian rights, and disabled themselves to grant such rights to the plaintiff; and consequently their grant of the land to the plaintiff did not pass the riparian rights theretofore granted to the Montecito Water Company, without which the plaintiff is not entitled to complain that those rights have been infringed by the defendant. In other words, the plaintiff is not

entitled to maintain an action for the protection of rights which he has not.

It is suggested, however, that even in this supposed hypothetical case the plaintiff would have a reversionary right to be protected against the acquisition by defendant of a right by prescription. But this would depend upon the terms and conditions of the grant to the Montecito Water Company. If that grant is only for a limited term, or is upon a condition subsequent by which it may be terminated, the plaintiff would be entitled to maintain an action to protect his reversionary right. But if the grant is absolute and unconditional, the plaintiff has no reversionary interest. That such a grant may be absolute and unconditional appears by the authorities above cited. But for reasons above stated, it is not intended to intimate, in this opinion, what construction should be given to the written agreement above referred to in any respect.

THE COURT.—For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial.

Restoration of Stream to Original Bed—Alteration of Channel.

MORTON v. OREGON SHORT LINE RY. CO.

(48 Or. 444, 120 Am. St. Rep. 827, 87 Pac. 151.)

Action by J. A. Morton against the Oregon Short Line Railway Company. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

This is a suit by J. A. Morton against the Oregon Short Line Railway, a corporation, to enjoin the maintenance of obstructions to the flow of water in a stream. The complaint states, in substance, that the plaintiff is the owner of certain real property in section 28, township 18 south, of range 47 east, in Malheur county, which land lies west of and borders on the Snake river; that in 1904 the defendant built above

such premises, in the west channel of the stream, certain dams which deflected the water, depositing sediment in the channel, and shoaling it so as to prevent the operation of plaintiff's private ferry-boat from his land to an island in the river, and also depriving his arid land of water from the river for sub-irrigation; that these obstructions caused another channel to form in such direction as to force a current directly against the bank of his land, cutting away a wide margin thereof, and if such encroachment is permitted to continue, it will force a channel through a depression in his premises, making an island of a part thereof to his irreparable injury, to redress which he has no plain, speedy or adequate remedy at law. The answer denied the material allegations of the complaint, and averred, in effect, that in 1883 the defendant built its railroad through Malheur county on the right of way now occupied thereby, and thereafter maintained its roadbed and track, operating trains thereon for the benefit of the public; that at the time the railroad was constructed the water of Snake river, during each freshet, flowed through a swale situated between the roadbed and the west channel of the river, and the floods in that stream have cut and are cutting away the bank near the track, thereby endangering the roadbed to such an extent that the defendant was compelled to build the obstructions complained of, to prevent its property from being destroyed; and that the swale is the so-called channel referred to in the complaint as the west channel of the river, but that such swale is, and at the time the railroad was constructed was, at least three hundred feet west of the west channel of Snake river. The reply having put in issue the allegations of new matter in the answer, the cause was referred, and from the testimony taken the court made certain findings and dismissed the suit, from which decree the plaintiff appeals. . . .

MOORE, J. (after stating the facts).—The transcript shows that plaintiff is the owner of the real property mentioned, and that his land borders on the west bank of the Snake river. The township referred to was surveyed in 1874, and the field-notes thereof, a copy of which was offered in evidence, shows that the left bank of the river, as meandered, then intersected the south boundary of section 33, at a point

68.35 chains west of the southwest corner of that section and extended northwesterly by a curved line to a point west, but near the center, of section 33; thence, by a similar line northeasterly, to a point east of the northeast corner of that section; thence westerly and northerly by a curved line to a point west of, but near the center of, section 28; and thence northeasterly to a point 2.80 chains east of the northeast corner of the latter section. A sketch of the margin of the river, as indicated, will disclose that, when the government survey was made, the stream flowed around a peninsula over which the boundary between sections 28 and 33 extended. The defendant, in 1883, constructed its railroad from Huntington, Oregon, southerly through the premises hereinbefore described, and also through adjoining land on the south, now owned by H. M. Plummer. The defendant offered in evidence a blueprint of the *locus in quo*, reduced to a scale of four hundred feet to the inch, which indicates the original course of the river as meandered, the line of the railway as constructed, and other data. It appears from this plat that the railroad was built about fourteen rods west of the meander line at the bend near the center of section 28, and about fifty-two rods west thereof at the curve near the middle of section 33. An extraordinary freshet in Snake river in 1894 cut across the base of the peninsula a new channel, which extends northeasterly over what theretofore had been a meadow. Prior to such change a large part of the river below the peninsula flowed in a channel that separated plaintiff's land from Datey island, east of his premises; but, after such flood, the greater volume of water flowed east of that island. Immediately north of section 33, but south of Datey island, the change in the channel of Snake river formed a large sandbar, constituting an island, the surface of which was above the ordinary stage of water. The bar is separated from the left bank of the river by a narrow channel which extends northerly, and is also severed from Datey island by a broader channel that extends northwesterly, the waters of which unite and flow by plaintiff's premises. The freshet adverted to and the annual floods in the river have washed away the left bank of the stream in sections 28 and 33, nearly to the east line of the right of way of the railroad, and, to prevent further injury therefrom, the

defendant placed several hundred carloads of rock along the margin of the river; and in 1903, with Plummer's consent, it built, where the swale had been, five jetties that extend from the bank downstream at an acute angle with the thread thereof. These obstructions were made by driving parallel rows of piling about twelve feet apart, and filling the intervening space with brush and rock. The lower jetty is about two hundred and fifteen feet long, and extends nearly across the channel west of the sandbar at the head thereof. The other jetties are from fifty to seventy-five feet in length. Another extraordinary freshet in 1904 caused the bank of plaintiff's land, for a distance of about half a mile, to be washed away to the depth of about one hundred feet or more, whereupon he instituted this suit, and, at the trial, offered testimony tending to show that the lower jetty prevented the water from flowing in the channel west of the sandbar, thereby permitting the current in the channel between the bar and Datey island to flow nearly at right angles against his bank, damaging it; that the closing of the channel west of the sandbar caused sediment to be deposited, shoaling the channel east of his land, and preventing him from operating, by force of the current, a ferry-boat which he maintained for his own use from his premises to Datey island, a part of which he held by a lease from year to year, and another part thereof was claimed by his son as a homestead where cattle were pastured in which he had an interest; and that if the lower jetty be maintained, the diminution of water in the channel will prevent the sub-irrigation of his land, which is arid, and will also permit the water in the channel north of the sandbar to cut into a swale on his premises, thereby forming a new course through his land and creating an island. The testimony relating to the injury which it is claimed will result to plaintiff's land by the maintenance of the lower jetty, though given by persons living in the vicinity of his premises, who are acquainted therewith, know the character of the soil, and the effect thereon of freshets in the river, consists of the opinions of several witnesses, and it is possible that the disastrous consequences which they predict may not eventuate. It was stipulated that three civil engineers who were employed by the defendant would, if present, testify that in the early spring of 1905

they made accurate measurements of the left bank of the river through the plaintiff's premises, setting stakes along the margin of the stream, and that returning to his land in the latter part of July, after the annual freshet had subsided, they found that no part of the bank had been washed away during that season, but that the water in the river in 1905 was not as high as it was the preceding year. The foregoing is deemed a fair statement of the material facts involved, and based thereon, the question to be determined is whether or not the jetties can legally be maintained where they are built. The defendant's counsel insist that the river having suddenly changed its channel in 1904, thereby endangering the railroad track, their client, to protect its property, was authorized to restore the flow of the stream to its original bed, and hence the decree should be affirmed.

It has been held that the person across whose land a freshet in a natural stream suddenly causes a new channel to be formed may, within a reasonable time, restore the flow of water to its original bed. (Farnham on Waters, sec. 491; *Mathewson v. Hoffman*, 77 Mich. 420, 43 N. W. 879, 6 L. R. A. 349.) It will be remembered that the defendant built the jetties into the river from the bank of Plummer's land with his consent, and, as he is a riparian proprietor on the new channel, the railway company, as his licensee, secured such right to change the flow of the current as he possessed. (*Slater v. Fox*, 5 Hun (N. Y.), 544.) An examination of the blue-print referred to shows that the upper jetty is built nearly half a mile below the original meander line of the river where it commenced to cut the new channel, and as the barriers complained of do not force the water around the peninsula, they were evidently constructed to prevent injury to the railroad grade by deflecting the current. Instead, therefore, of attempting to restore the stream to its ancient channel, the defendant, by building the jetties, has in fact recognized the new way as the true watercourse, and tried to confine it to the bed as at first made. The swollen current of Snake river during floods is nevertheless a part of that stream, at the place where the jetties are built, and not surface water, within the accepted meaning of that term, against which a land proprietor may combat as he would oppose a common enemy,

though he thereby injures the real property of others. (*Price v. Oregon R. R. & Nav. Co.*, 47 Or. 350, 83 Pac. 843.) The defendant's counsel, in support of the decree rendered, cite the case of *Gulf etc. Ry. Co. v. Clark*, 101 Fed. 678, 41 C. C. A. 597, upon the authority of which the trial court evidently relied. In that case a railroad company, to protect its roadbed, a part of which had been washed away by the gradual change of the channel of a river, built dikes some distance from the bank of the stream on what was formerly solid ground, to restore the current to its original channel. These dikes encroached upon the channel as it existed when they were built, and deflecting the current a subsequent freshet in the river washed away part of the land of a riparian proprietor, who in an action to recover the damages sustained secured a judgment, in reversing which the circuit court of appeals says: "A riparian owner may construct necessary embankments, dikes, or other structures to maintain his bank of the stream in its original condition, or to restore it to that condition, and to bring back the stream to its natural course; and, if it does no more, other riparian owners upon the opposite or upon the same side of the stream can recover no damages for the injury his action causes them." In that case, as the means adopted to prevent the roadbed from injury from encroachments of the channel consisted of dikes, the term "other structures," referred to in the opinion quoted, evidently means similar formations, and not jetties placed in a stream to deflect its course. The conclusion reached in the case adverted to is at variance with the rule announced in *Gerrish v. Clough*, 48 N. H. 9, 97 Am. Dec. 561, 2 Am. Rep. 165, where it was held that though a riparian proprietor was authorized to protect the bank of his land from injury from the encroachment of a natural stream, he could not, without incurring liability, erect any structure for that purpose which would injure the property of others. These cases illustrate the conflict that exists in respect to this important subject. Which rule is founded on the better reason, or supported by the greater weight of judicial utterance, is not necessary to a decision herein.

The words "embankment" and "dike," when used to represent the means employed to prevent the inundation of land,

are synonymous, and mean a structure of earth or other material usually placed upon the bank of a stream or near the shore of a lake, bay, etc.; the ends of which extend across lowland to higher ground, forming a continuous bulwark or obstruction to water, and designed to keep it without the inclosure thus formed. A dam, however, is a structure composed of wood, earth or other material, erected in and usually extending across the entire channel at right angles to the thread of the stream, and intended to retard the flow of water by the barrier or to retain it within the obstruction. A jetty is a kind of a dam usually built in the manner hereinbefore described, and intended to deflect the current so as to deepen the channel or to form an eddy below the obstruction in which sediment may be deposited, thereby extending and protecting the bank. Assuming without deciding that an embankment may be built by a riparian proprietor to prevent his land from being submerged in extraordinary freshets, we think a jetty cannot be classed as "other structures" specified in the case relied upon, and that when they, by deflecting the current or by shoaling the water, injure a lower riparian proprietor, the author of the obstructions violates the maxim, "*Sic utere tuo ut alienum non laedas.*" One of the issues to be tried is the identity of the watercourse west of the sandbar at the head of which the long jetty is built. "The channel," says a distinguished text-writer, "is a passageway between the banks through which the water of the stream flows." (Farnham on Waters, sec. 417.) This definition was undoubtedly intended to apply only to the entire uninterrupted space occupied by water flowing between well-defined banks. The description of a channel, as given by the learned author, is broad enough, however, to include the flow of water between an island and a bank of a stream, and hence the exact meaning of the word embraces the passageway that was obstructed by the defendant's lower jetty. As the blue-print shows this to be a watercourse which is indicated by the explanatory words, "Very swift and shallow," and shows the passageway to be the most westerly route, we have no doubt that it is, as alleged in the complaint, the west channel of the Snake river.

It appears from the transcript that the lower jetty was intended to close this entire channel, but that the water, de-

flected by the angle of the barrier, washed the sand from the outer end of the obstruction, permitting a part of the current to continue in the bed of the stream west of the sand-bar, but causing the greater volume to flow east thereof. As a jetty is a species of dam, and the lower obstruction deprives a riparian proprietor of the accustomed flow of water in the channel of the stream, is the deprivation of the right which is incident to the estate such an injury as will authorize the granting of the relief sought? The plaintiff and his witnesses express the opinion that if the water is permitted to flow in the west channel, it will continue its course along the bank of his land and diverge the current, which otherwise strikes his premises at nearly right angles. This consensus of opinion is not based on observations as to the effect of the water at the line of injury to plaintiff's land during the flood of 1904, but the consequences assumed, though speculative, seem so reasonable and dependent upon the laws of nature, of which a court will take judicial notice, that we are forced to the determination that injury must necessarily result to plaintiff's premises, and to his property rights incident thereto, if another freshet should occur in the river. The conclusion thus reached makes such a case as entitles the plaintiff to equitable intervention, but, as the lower jetty is the only one of which he seriously complains, that obstruction only will be ordered abated.

The defendant's objections to the plaintiff's right to institute this suit and to prosecute this appeal not being deemed important, the decree is reversed, and one will be entered here requiring the defendant, within three months from the entry of a mandate herein in the lower court, to remove the long or lower jetty; the plaintiff to recover his costs and disbursements in both courts.

Riparian Rights—Unreasonable Method of Diversion.

SHOTWELL et al. v. DODGE.

(8 Wash. 337, 36 Pac. 254.)

STILES, J.—The respondents move to strike the bill of exceptions containing the evidence in this case, on the ground that no error is assigned upon any matter excepted to in the bill itself. The point, we think, is not well taken. The exception is contained in the record, being an exception to the refusal of the court to grant a new trial on the ground that the verdict was not sustained by the evidence. The bill of exceptions is merely a part of that exception, containing, as it does, all the evidence introduced at the trial. Where the error alleged is the refusal of the court to grant a new trial on the ground of the insufficiency of the evidence, the only way to correct the error in this court is by presenting all the evidence in the case, either in the form of a bill of exceptions or statement of facts. The motion is therefore denied.

The complaint in this case is for the diversion of water from a flowing stream, to the plaintiff's damage. The complaint alleges that the plaintiffs were at the date of the commencement of the action, and at all times in the complaint mentioned, the owners of a certain tract of land described, and were in possession thereof, and that they and their grantors had owned said land, and been in the sole and exclusive possession of the same, since the year 1854, that the defendant owned a half section of land lying immediately north of, and adjoining, plaintiffs' tract; that through the lands of both parties a brook or creek, viz., Mima creek, flowed from north to south, within a well-defined channel, protected by natural banks; that plaintiffs, in 1891, built a dam across Mima creek, upon their own land, and constructed various ditches therefrom, to irrigate their lands in connection with their farming operations, in raising hops, grain, vegetables, and fruits, and also for the purpose of conveying the waters of the stream to their dwellings and barns, to use the same for domestic purposes; that the land was entirely dry, and without irrigation was not productive; that in 1892 the defendant built a dam

across the creek, on his land, whereby he completely stopped the water from flowing in its accustomed channel through plaintiffs' land, as it was accustomed to flow, and from flowing into and through plaintiffs' ditch; that in connection with his dam the defendant also constructed a ditch by which he carried the water of said creek eastward, over his own land, where he permitted it to scatter and waste, without providing any artificial channel for its return to the bed of the creek. The damages laid for a diversion of the water were \$5,000, and special damages were also pleaded, by showing that a crop of hops which plaintiffs grew on their lands in 1892 was decreased in value in the sum of \$1,000; and \$250 was claimed for the plaintiffs' deprivation of water for domestic purposes. The defendant demurred to this complaint for the reason that there was no allegation that the plaintiffs had the right to use the water of the creek, or any portion of it. It will be observed that one of the grounds of damage alleged is the mere diversion of the water from its accustomed channel; and appellant's position is that such action, coupled with the allegations of waste which the complaint contains, is insufficient in law to base a claim of damages upon. Every owner of land, through which a natural stream of water ordinarily flows, is entitled to have such flow continued without interruption or diminution, except as the interference may be caused by the reasonable use of water by other proprietors of the stream, higher up, along its course. To sustain an action for damages of this character, no allegation of any actual use is necessary. The right to the flow is absolute, and when that has been interrupted the right to nominal damages is complete. (*Parker v. Griswold*, 17 Conn. 288, 42 Am. Dec. 739.) We have examined numerous precedents for complaints in such cases, including those cited in 2 Chit. Pl., 6th ed., 624 et seq., and those noted in 2 Boone, Code Pl. 326, and without exception they contain, in each instance, an allegation of the right to use flowing water. But, in view of the fact that this right to the uninterrupted flow of water is a part of the land itself, we see no necessity for an allegation that the owner and possessor of the land is also the possessor of this right, because the ownership and possession of the land imply the ownership and possession of the right as well.

Counsel urges that the right is separable from the land, and might have been conveyed, or the right to the use of the water by some other party might have been acquired by prescription. But it must be remembered that the wrong complained of is a trespass, and, by analogy with other cases of trespass upon real property, the allegation would be unnecessary. It is a trespass for one person to step upon the land of another, and damages may be recovered therefor; but it is not necessary, in such case, that the pleader allege that the plaintiff had a right to have the grass upon which the trespasser trod continue to grow after the manner of its nature. A complaint for the injury or destruction of trees need not allege that the owner and possessor of the land upon which the trees grew had a right to have them continue to grow. In each case, if, as a matter of fact, the owner of the land has parted with the grass or trees to some third person, who in that case would be the injured party, it is the privilege and duty of the defendant to plead those facts as his defense. So, if the land owner has parted with his right to the flowage of water, where the gravamen of the action is the interruption of the flow, the alienation is matter of defense.

The only other error alleged in this case is that the evidence did not justify the verdict, and upon that point we find it necessary to agree with appellant. The jury found a verdict for \$850. Under the facts shown, we think the evidence was sufficient to have justified a verdict for nominal damages against the defendant for the diversion of the water. He confessed to the building of a dam in the bed of the stream, and to the diversion of a considerable portion of the water therefrom, and showed no reasonable use thereof. So far as his use of the water for domestic purposes was concerned, his acts might possibly have been sustained; but his pretended irrigation seems to have amounted to nothing more than the digging of a single ditch for a long distance through his farm, and allowing the water to flow freely through it until it became lost at the end of the ditch. The soil through which the ditch passed was of such a character that a very large amount of water would necessarily be lost in its mere passage through the ditch. Allowance must, of course, be made for some such loss; but when the loss becomes extreme, by reason of the

porous character of the soil, and water is scarce, it becomes necessary for an irrigator to take reasonable means to lessen the amount of loss. As to defendant's irrigation, itself, it amounted to nothing more than suffering the water in the ditch to percolate sidewise through the banks, along which certain orchard trees and garden vegetables were growing. This was not irrigation at all; much less, reasonable irrigation. Where water is an important feature in the success of farming operations, it becomes the irrigator to use proper means to bring the water to points where it is needed; to use it only at such times and in such quantities as are necessary for the purpose; and then, if others situated like himself require the water, to stop its flow until it shall again become necessary. The constant flow of water in the ditch, all the summer through, to the extent to which the defendant caused the water of Mima creek to flow, would be inexcusable, under any circumstances, when others had equal need of the water for irrigation. But beyond this nominal damage, the plaintiffs showed no fact upon which a substantial recovery could be based. At the highest point on the creek on their farm, immediately adjoining the defendant's land, they also constructed a dam, nine feet high, and dug a ditch. The point at which their ditch left the creek seems to have been a difficult one from which to take out water; but their object was to run the water at a right angle from the creek, a distance of from a quarter to a half mile, and there discharge it at a high point on their land, so that it would irrigate a large area which they had planted in various crops. To accomplish this purpose at all, the bottom of their ditch had to be some five feet above the level of the stream. Their dam, therefore, as stated before, was nine feet high, and the water had to be set back in the reservoir or pond to the depth of at least six or seven feet before it would make the required depth in their ditch. The effect of this was to set the water back upon the defendant's land so that it overflowed a half acre or more. Conceding that it was competent for the plaintiffs to build their dam where they did, they had no right to cause the water to spread itself out in a pond on the defendant's land. Just how high they could raise the water at their dam before it would flow back on to defendant's land did not appear; and neither did

it appear that, without such reflow of the water, they would have had any water whatever in their ditch. They cannot base their right of action upon a wrong committed by themselves, and until it be shown that, without committing such wrong to defendant, their ditch would have furnished the water of which they say they were deprived, they cannot maintain their action.

As to the evidence of damage, nothing was shown as to the damage suffered by deprivation of water for domestic use, except that it was sometimes necessary to carry water from the stream to their houses, a quarter of a mile distant, instead of getting it from the ditch. But while they would have had a right to complain of their loss for domestic purposes, had none been left in the stream, as there was, in fact, at all times, abundant water for such purposes in the stream, they cannot complain that their ditch did not furnish it at the distance at which their houses stood, unless it be shown that, when the water in the dam was lowered so as to relieve defendant's land from the reflow, water would still have been served to their houses in the ditch. Moreover, nothing was shown as to what amount of inconvenience, or loss of time, or labor was involved in getting the water for domestic purposes from the stream.

As to the hops, it appeared that, in 1891, seventy-nine bales of hops were raised on ten acres, when water was plenty, and that in 1892, from fifteen acres, only fifty-nine bales were raised, water being scarce. The difference in the quantity of hops in the two years was some fourteen thousand pounds, estimating the additional five acres of 1892 as full-bearing hops; but it was shown that this was the first year of those five acres, when they were not expected to bear to any profitable extent. Conceding, however, that there was a considerable loss by reason of the want of water, the evidence merely showed that hops were worth from thirteen to twenty-two cents a pound in 1892, and the case was left to the jury upon the inference that the gross amount of hops at the price of hops in that year would have been the actual loss. But such is not the measure of damages in such cases. The net loss is all that can be recovered, viz., the market value of the crop alleged to be lost, over the cost of producing, harvesting, and

marketing. (*Lommelund v. St. Paul etc. R. R. Co.*, 35 Minn. 412, 29 N. W. 119; *Holden v. Winnipiseogee Lake Co.*, 53 N. H. 552; *Sedg. Dam.*, pp. 191, 937; *Smith v. Chicago etc. R. R. Co.*, 38 Iowa, 518.) But, as was said before, until it should appear that, with the water at the dam lowered to a point where it could not flow over defendant's land, there would have been water enough in the ditch to have saved the hops, there could be no recovery for their loss. Judgment reversed, and cause remanded for a new trial.

Riparian Rights—Domestic and Irrigation Uses.

NIELSON et al. v. SPONER.

(46 Wash. 14, 123 Am. St. Rep. 910, 89 Pac. 155.)

ROOT, J.—This action was brought by respondents, as lower riparian owners, to enjoin the appellant from unreasonably using and diverting the waters of Thomas (or Sponer) creek, a small stream flowing across the lands of appellant and respondents. From a judgment and decree in favor of respondents, this appeal is prosecuted.

It appears that there is very little water in said stream during the months of July, August and September; that at times during said period the appellant diverted said water for the purpose of irrigating his orchard. It is claimed by respondents that this water was diverted by means of a small ditch running through soil that was very porous, and which necessarily occasioned the loss and waste of much of the water; that the water was not returned to the creek, and consequently respondents could get no water for domestic purposes from said creek during the summer period, when the water was so diverted by the appellant. The latter claims that during the said summer months there is no water in the creek, excepting such as comes from a spring situated upon his premises, and contends that he is entitled to take all of such water that is capable of being used upon his premises. He relies as authority for this upon section 4114 of 1 Ballinger's Ann. Codes

& St., a part of which reads as follows: "Provided, that the person upon whose lands the seepage or spring waters first rise shall have a prior right to such water, if capable of being used upon his lands." This statute was enacted in 1890. The evidence in this case shows that respondents' land was patented in 1883, and that it has been occupied ever since. Under the common law, each riparian proprietor had a right to ordinary use for domestic purposes of water flowing in a defined stream past or through his land. In the case of *Geddis v. Parrish*, 1 Wash. 587, 21 Pac. 314, the supreme court of Washington Territory held that a lower riparian owner was entitled to and could exercise this right even though the waters of such stream originated in a spring upon the land of the person seeking to divert them from the natural channel.

Under the authorities it would seem that the privilege of the respondent's predecessors to use the waters of the stream in question here was a property right running with the land from the time it was patented by the government in 1883. This being true, an act of the legislature in 1890 authorizing a land owner to use all the spring water arising on his land, and thereby destroying the use of such water to the lower riparian owner, would be unconstitutional, as a taking or destroying of property without due process of law. Appellant had the right to make free use of this water, whether it came from a spring on his land or otherwise, for ordinary domestic purposes; but we do not think that irrigation, at least when conducted in the manner that this was, can constitute a use which will justify an upper riparian owner in taking all of the water, to the destruction of the ordinary domestic uses thereof by a riparian owner below, in the absence of a prior legal appropriation.

The judgment of the superior court is affirmed.

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Nov 5 1893

Motives of Lawful Acts by Riparian Proprietor—*Damnum Absque Injuria*.

W. F. FISHER, Respondent, v. JULIA M. FEIGE et al., Appellants.

(137 Cal. 39, 92 Am. St. Rep. 77, 69 Pac. 618, 59 L. R. A. 333.)

McFARLAND, J.—This is an appeal by defendants from a judgment in favor of plaintiff.

The plaintiff is a lower riparian proprietor on a certain watercourse, and defendants are upper riparian proprietors thereon. The action was brought to recover damages in the sum of five thousand dollars for certain alleged interferences by defendants with the flow of the water in the stream, and for a perpetual injunction restraining defendants from their repetition of the alleged wrongs. The court found that plaintiff was damaged in the sum of one cent by the alleged wrongs, for which amount judgment was rendered; and by the judgment defendants were also perpetually enjoined from doing certain acts. Defendants appealed from the judgment.

It is quite clear that the judgment, as it stands, cannot be rightfully affirmed. There is no averment or finding that defendants have diverted any water from the stream. It is averred that along and adjacent to the stream as it flows through defendants' land there is a heavy growth of timber, which, before the alleged wrongful acts of defendants, protected the waters of the stream from evaporation by drying winds and the rays of the sun, and that defendants have cut and felled a large number of trees, and thus let in the sun and the wind, and caused the waters to be diminished by evaporation, so that not as much flowed down on to plaintiff's land as formerly; and that they threatened to fell more of said trees in the future. It is also averred that defendants have erected certain dams or embankments across the stream by which the waters have been prevented from flowing down the channel of said stream "as they have been accustomed to flow," and from flowing into and upon the land of plaintiff, "as they otherwise would have flowed." It is also averred

that defendants caused about ten trees to be felled into said stream, and allowed them to remain there, and that this rendered the waters unpalatable and unwholesome. It is also averred that defendants' land is wild and untilled, and is not susceptible to cultivation. The foregoing constitute the main averments upon which plaintiff bases his prayer for damages and injunction—it being averred that defendants threaten to continue the said acts. It is also averred, and found by the court, that said acts were done by defendants, “solely for the purpose of injuring the plaintiff and damaging his said property, and out of spite and ill-will toward the plaintiff.”

As both court and counsel seem to have attached considerable significance to the alleged motive which led defendants to do the acts complained of, it may be proper to briefly notice that subject. In civil cases, of the character of the one at bar, the general rule, no doubt, is, as stated in *Mayor etc. of Bradford v. Pickles*, [1895] App. Cas. 587, that “no use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious.” But there may be cases where the very question of the legality of an act would depend upon the purpose for which it was done. This is particularly so with respect to the use of water under the law of this state on that subject. For instance, a riparian owner in California has a right to a reasonable use of the water of a natural stream running through his premises for the purpose of irrigating his riparian land; and this includes the incidental right to divert on to his land what, under all the circumstances, would be a reasonable amount of the water, by dams and other necessary appliances. And in an action by a lower against an upper riparian owner for diversion of water, the latter could successfully defend by showing that he had only used a reasonable amount of the water to irrigate his land; but there would be no such defense if it appeared that he diverted the water merely to let it run to waste, and did not make, nor intend to make, any beneficial use of it for irrigation, or that he had carried it to nonriparian lands. He could not lawfully, any more than could one claiming merely by appropriation, thus divert the water without applying it to a beneficial use.

But in the case at bar there was no diversion; and under the facts found we cannot see how the lawfulness of the acts enjoined can depend upon the motives by which they were done, or may be done in the future.

It is found that the defendants did fell trees on their lands, and threatened to fell more, the effect of which was, and would be, to let in the sun and winds, and thus increase evaporation. It was also found that they had built some dams in the stream by which the waters were prevented from flowing "as they otherwise would have flowed"; but there is no finding that these dams prevented the usual amount of water from reaching plaintiff's land. It was also found that the land of defendants is wild and untilled, and "for the greater part, is not susceptible of cultivation."

There is also a finding—somewhat obscured by being mixed up with other matters in finding No. VI—that defendants felled some trees in the stream by which the waters were rendered unpalatable and unwholesome, and that they threatened to fell other trees into the stream, there to remain and decay, whereby the waters of said stream will be rendered unfit for household and domestic purposes. The foregoing are substantially the findings upon which the injunction is based. The injunction is most sweeping in its terms. By the judgment the defendants are "perpetually enjoined and restrained from in any manner obstructing or impeding or hindering the natural flow of the waters of that certain stream at any point therein or thereon above the said lands of plaintiff," and also "from cutting or felling the timbers and trees growing in the channel and upon the immediate banks of said stream at any point above the said lands of the plaintiff, whereby the said stream will be exposed to the rays of the sun and the waters thereof lost or materially diminished by evaporation." They are also enjoined from felling any trees into the stream and allowing them to remain there and decay. No right is preserved to defendants, except to take water for domestic purposes and for stock.

It is evident that very little, if any, of this injunction can be sustained. It is quite apparent that cutting trees upon one's own land is a lawful act which cannot be restrained because it "lets in the sun" and causes more evaporation; any

incidental damage which might come to a lower riparian owner from such lawful act would clearly be *damnum absque injuria*. And, then, a man may build a dam across a stream on his own land, provided that thereby he does not appreciably diminish the amount of water which should naturally flow on to the land of his neighbor below. But, in addition, the judgment in this case perpetually prohibits defendants from ever exercising many of the undoubted rights of riparian owners. They are allowed only to use "so much of the waters of said stream as may be necessary for their household and domestic purposes, and for water for their stock." There is not even any provision for changing conditions. The defendants are perpetually cut off from ever using the water for irrigation, or as motive power, or for fish-ponds, bath-houses, etc., or for ornamental and many other purposes, for which a riparian proprietor may, in a measure, control the stream on his own land, if he does not thereby materially diminish its flow on to lands below, or appreciably adulterate its quality.

No doubt, the defendants could be enjoined from felling trees into the stream, if thereby the water was made unfit for domestic use; but on that subject the findings should, we think, be more certain and specific. It does not fully appear that the injury thus done to the quality of the water was material; and the findings as to that matter are rather inconsistent with the other finding, that all the damage done by all of the alleged acts of defendants amounted to only one cent. If there be another trial, there should be a fuller finding on this subject; and also as to whether the dams alleged to have been made by defendants on their own land materially lessened the flow of the water on to the land of plaintiff.

The judgment appealed from is reversed.

Riparian Owner—Diversion of Flood Waters.

W. J. FIFIELD, Appellant, v. SPRING VALLEY WATER-
WORKS, Respondent.

(130 Cal. 552, 62 Pac. 1054.)

VAN DYKE, J.—The plaintiff and appellant is the owner of a certain tract of land in San Mateo county, through which the waters of San Mateo creek flow in a natural channel. The defendant is a corporation conducting and carrying on the business of supplying the inhabitants of the city and county of San Francisco with water. It is charged in plaintiff's complaint that defendant is engaged in constructing a tunnel above plaintiff's land, with the intent and purpose of diverting through said tunnel, when completed, the waters of said creek into the San Andreas reservoir, thereby preventing the same from reaching or flowing through the land of the plaintiff. And an injunction is prayed to prevent the defendant from so diverting the waters of said creek.

In defendant's answer it is denied that said defendant threatens, or ever has threatened, or intends to divert the waters of said creek as in the complaint alleged, but avers that it only intends to divert through said tunnel the storm and flood waters, and none of the ordinary flow of said stream.

The court finds that it is not the object of defendant in constructing said tunnel to divert any of the waters of said creek into said San Andreas reservoir, except said storm or flood waters, or waters flowing in said creek during times of extra high water or freshets in said stream, nor in any other way, nor to any other extent, to prevent the waters of said creek from reaching or flowing through the lands of the plaintiff. The judgment and decree entered upon the findings is, after defining storm or freshet waters to be such waters as flow down a stream during and after a rainstorm, and which are in excess of the ordinary flow, "that the defendant is hereby enjoined and restrained from diverting or in any way restraining, at any time or times, the ordinary flow of water in San Mateo creek through the lands of plaintiff, as said ordinary flow is above described and defined; and that the defend-

ant be, and it is hereby, permitted and authorized, by the flume and tunnel mentioned in its answer, as above plaintiff's said land or otherwise, to take and divert from said San Mateo creek, above the said lands of plaintiff in the complaint described, the storm or freshet or flood waters (as above described or defined) that may flow in or into San Mateo creek above said lands, during times of extraordinary high water or freshet in said creek or stream, provided that defendant permits at all times all the ordinary flow of said creek to go down to plaintiff's lands, and provided that defendant shall make such diversion so as not at any time to stop or divert any of the said ordinary flow above plaintiff's said lands, and provided that it uses, and it is hereby directed to use in the premises, mechanical means capable of accomplishing and actually accomplishing such results as aforesaid, namely, permitting at all times all the ordinary flow of said San Mateo creek to go down to said plaintiff's lands described in the complaint, and so constructed as not at any time to stop or divert any of said ordinary flow down said creek to said plaintiff's said lands."

The respondent contends that there is no appeal in this case from the judgment in question, for want of a proper notice. It must be admitted the notice is unusual in form. The law requires a notice to state that the appeal is taken from the judgment or order appealed from, "or some specific part thereof." (Code Civ. Proc., sec. 940.) Here the notice reads that the plaintiff in the above-entitled action appeals from the judgment therein given in favor of the defendant in said action, and against said plaintiff, "and from the whole of said judgment, and particularly that portion of said judgment whereby defendant is adjudged entitled to divert a portion of the waters of San Mateo creek." But the judgment here is not in favor of the defendant, but is in favor of the plaintiff, and he is awarded his costs in the action. Plaintiff can hardly be presumed to have intended to appeal from a judgment in his favor; but from the literal reading of the notice, however, it might bear that construction, for it reads "and from the whole of said judgment and particularly that portion," etc. However, it is not necessary to pass upon this objection to the notice of appeal, for the case must be disposed of in favor of the respondent upon the merits.

The court finds that the diversion of the storm or flood water by defendant as proposed "will not damage said land in any way, nor in any way interfere with plaintiff's right in the premises, or with the rights appurtenant to said land." This being so—and the finding upon this appeal from the judgment must be taken as conclusive—the plaintiff is not injured, and cannot be damaged by the diversion of storm or flood water, hence it is not entitled to an injunction restraining the diversion of such storm or flood water. In *Modoc Land etc. Co. v. Booth*, 102 Cal. 151, 36 Pac. 431, the court says: "It seems clear, however, that in no case should a riparian owner be permitted to demand, as of right, the intervention of a court of equity to restrain all persons who are not riparian owners from diverting any water from the stream at points above him, simply because he wishes to see the stream flow by or through his land undiminished and unobstructed. In other words, a riparian owner ought not to be permitted to invoke the power of a court of equity to restrain the diversion of water above him by a nonriparian owner, when the amount diverted would not be used by him and would cause no loss or injury to him or his land, present or prospective, but would greatly benefit the party diverting it. If this be not so, it would follow, for example, that an owner of land bordering on the Sacramento river, in Yolo county, could demand an injunction restraining the diversion of any water from that river for use in irrigating nonriparian lands in Glenn or Colusa county. And yet no one probably would expect such an injunction, if asked for, to be granted, or, if granted, to be sustained."

In *Edgar v. Stevenson*, 70 Cal. 286, 11 Pac. 704, it was held that a riparian proprietor who has appropriated and uses all the water of a stream crossing his land, as it ordinarily flows, cannot restrain the diversion during times of extraordinary high water of the surplus not used or appropriated by him. (See, also, *Heilbron v. '76 Land etc. Co.*, 80 Cal. 189, 22 Pac. 62; *Black's Pomeroy on Water Rights*, sec. 75.)

Judgment affirmed.

Estoppel—Mexican Law—Public Lands of the United States Held as Private—Rights of Riparian Proprietor and Subsequent Appropriator—Common Law not Abrogated—Constitutional Principles—Appropriation not Common-law Doctrine.

CHARLES LUX et al., Appellants, v. JAMES B. HAGGIN et al., THE KERN RIVER LAND AND CANAL COMPANY, Respondents.

(69 Cal. 255, 10 Pac. 674.)

McKINSTRY, J.—The question being, Can a private corporation divert the waters of a watercourse, and thereby deprive the riparian proprietors of all use of the same, without compensation made or tendered to such proprietors? held:

1. The owners of land by or through which a watercourse naturally and usually flows have a right of property in the waters of the stream.

2. This property may be taken for a public use, just compensation being first made, or paid into court.

Water to supply "farming neighborhoods" is a public use. And it is for the legislature to determine whether, in the exercise of the power of eminent domain, it is necessary or expedient to provide further legal machinery for the appropriation (on due compensation) of private rights to the flow of running streams and the distribution of waters thereof to public uses.

3. But one private person cannot take his property from another, either for the use of the taker or for an alleged public use, without any compensation paid or tendered. (Const., art. 1, sec. 14.)

4. Riparian owners may reasonably use water of the stream for purposes of irrigation.

5. The court below erred in rejecting certain evidence offered by the appellants.

This action was commenced by Charles Lux, Henry Miller, James C. Crocker, and others, as plaintiffs, against James B. Haggin and many individuals and corporations, as defendants. By dismissals and amendments, Lux, Miller and Crocker be-

came the only plaintiffs, and the Kern River Land and Canal Company the sole defendant. Since the amended complaint was filed the suit has been prosecuted to obtain a decree enjoining the defendant, the Kern River Land and Canal Company, from diverting waters of Kern river, which, it is alleged, had flowed down a watercourse known as Buena Vista slough, through lands of the plaintiffs described in the complaint, and which (if not diverted) would have continued so to flow. Plaintiffs have appealed from a judgment in favor of the defendant, and from an order denying a new trial.

Before proceeding to decide what are the respective rights of riparian proprietors and appropriators of water, or to inquire into certain alleged errors of the court in rejecting evidence offered by the plaintiffs at the trial below, we propose to consider points made by respondent, which, if well taken, demanded an affirmance of the judgment, even though "the common law" as to riparian rights now prevails, or formerly prevailed, in this state. . . .

II. The plaintiffs are not estopped from maintaining this action by reason of their assent to and approval of certain acts of a third person,—the Kern Valley Water Company. 2

The next question is cognate to the one just discussed. It arises on certain findings from which, respondent contends, it appears plaintiffs lost their right to complain of any diversion of water before the commencement of this action.

The court below found:

"That the waters of Kern river do not, and never did, naturally and usually flow to, through, along by, over, or upon the said lands of plaintiffs, or any part thereof; and that until the year 1876, whatever of the water of Kern river flowed to or reached the said lands, or any part thereof, was from the unusual and extraordinary overflow of said river, or of Kern and Buena Vista lakes, or from the percolation and seepage in these findings mentioned.

"That in December, 1875, one Souther commenced, and in January, 1876, completed, a dam across Buena Vista slough, at a point designated on the map hereto annexed as Cole's crossing, on or about section five (5), township thirty-one (31) south, range twenty-five (25) east, Mount Diablo base and meridian, and south of where the waters of New river enter

Buena Vista slough, and thereby, at said point, checked the natural flow of the waters of said river through said slough into Buena Vista and Kern lakes, and caused the waters there flowing to take a northward course and away from the said lakes. That in March, 1876, the pressure of the waters against said dam broke through the same, and said river resumed its natural flow to Buena Vista and Kern lakes. That during the said interval of its flow northward, the waters of said New river flowed along said Buena Vista slough and the adjacent country, to and over Buena Vista swamp.

“That in the fall of 1876, certain parties commenced the construction of two certain canals, which are correctly laid down on the map hereto annexed, and marked respectively ‘East Side canal’ and ‘Kern Valley Water Company’s Canal.’ The said East Side canal commences on section fourteen (14), township thirty (30) south, range twenty-four (24) east, and extends thence some three (3) miles north on the eastern side of the said Buena Vista swamp, and does not touch any of said lands of the plaintiffs. The other canal, heading on section fourteen (14), township thirty (30) south, range twenty-four (24) east, as at present constructed, extends northward some twenty-four miles, is one hundred and twenty feet wide on the bottom, one hundred and forty feet wide on the top, and ten feet deep, with a fall of one foot per mile, and capable of carrying more than twelve hundred cubic feet of flowing water per second, and terminates at a point outside of said lands of plaintiffs. That in June, 1877, the Kern Valley Water Company, a corporation organized and existing under the laws of California, for the purpose of acquiring canals and water rights in said county of Kern and elsewhere within this state, to be used or disposed of for irrigation, transportation, domestic, mechanical, and other purposes, took possession and control of said canals, and thenceforth continued the construction thereof, northward toward the lake known as Tulare lake, designated on said map. That in the fall of the year 1877, the said Kern Valley Water Company reconstructed the said dam at Cole’s crossing; and in connection therewith constructed a levee extending westward to the bluffs on high ground, and running eastward from said dam about one and one-quarter miles, as shown on said map, thereby

preventing the waters of Kern river from flowing to Buena Vista lake, and turning the same northward to their said two canals. That at the head of said canals, and in conjunction therewith, the said Kern Valley Water Company, in 1877, constructed a certain other dam and levee, extending completely across the said Buena Vista swamp, as shown on said map, and thereby completely obstructed and prevented the natural flow of any water into, through or over said swamp northward of said last-mentioned levee, and appropriated and took possession and control of all the waters reaching said levee, and turned the same into the said canals. That the said dam and levee last mentioned are some distance southward from the southernmost part of the said lands of the plaintiffs, and from and after their construction no water has naturally flowed, or could naturally flow, beyond the head of said canals, or to or upon the said lands of the plaintiffs, or any part thereof.

“That the construction of the canals, dams, and levees described in the preceding finding was undertaken and prosecuted with the knowledge, consent, and approval of the plaintiffs.

“That the levee last described in said preceding finding was constructed for the purpose of diverting all the water reaching said levee into the said canals, and such levee does entirely obstruct, and since its construction has obstructed, the natural flow of any water northward in said Buena Vista swamp, beyond said levee, and diverts the same into said canals, and that the plaintiffs, at and before the time of the commencement of the construction of the said levee, knew of the purposes thereof, and approved the same, and knew of the beginning and prosecution of the construction thereof, and consented to and approved of such construction. That said canals and levee were constructed at great expense, and because of and in reliance upon the said approval and consent of the plaintiffs, and but for such approval and consent, would not have been constructed.”

The notice of appropriation of seventy-four thousand inches of water was posted and filed for record by defendant's assignors May 4, 1875. Their subsequent acts (it may here be conceded) related back to the posting and filing of the notice.

It may well be doubted whether the evidence sustains the finding that the plaintiffs consented to and approved of the canals and dams mentioned in the foregoing findings. We shall assume, however, that there was a substantial conflict in the evidence in that regard.

The building of the two dams, and the assent of the plaintiffs thereto, as found by the court, intervened between the appropriation by defendant's assignors and the commencement of this action.

The construction of the dam at Cole's crossing, with or without the plaintiffs' consent, is unimportant (with reference to the question we are about to consider) if the waters of Kern river have never naturally or usually flowed to their lands. The plaintiffs did not become riparian proprietors by reason of a diversion of the waters of Kern river toward their land (caused by the dam at Cole's crossing), with any right to complain of an appropriation made by the defendant or its assignors above Cole's crossing and before the dam was constructed at that place. And, on the other hand, if part of the waters of Kern river, in their usual and natural flow, reached the lands of plaintiffs (and they were deprived of it by defendant), it is immaterial that more water was turned in their direction by the dam at Cole's crossing.

It is said by appellants that since the court found the waters of Kern river never naturally and usually flowed to the lands of the plaintiffs, the findings last recited must be read as a finding that the levee near the head of the canals was built for the purpose of diverting, and did divert, into the canals of the Kern Valley Water Company, only the water turned toward plaintiffs' lands by the dam at Cole's crossing and the waters of extraordinary overflows.

But as the court found that the levee last mentioned prevented the passage of any water to the northward thereof, the respondent is entitled to the benefits of the findings in the alternative,—that is, as declaring that, even if the waters of Kern river in their natural and usual flow would reach the plaintiffs' lands, the plaintiffs had consented to the erection of a dam or levee by the Kern Valley Water Company, which diverted all such waters from their lands.

Section 811 of the Civil Code provides that the servitude may be extinguished by the performance of any act by the owner of the servitude, or with his assent,—upon either the dominant or servient tenement,—which is inconsistent with its nature or exercise. This seems to be a recognition and statutory declaration of the rule which Professor Washburn says has become well settled, that if the owner of a dominant estate do acts thereon which permanently prevent his enjoying an easement, the same is extinguished, or if he authorize the owner of the servient estate to do upon the same that which prevents the dominant estate from any longer enjoying the easement, the effect will be to extinguish it. (Washburn on Easements and Servitudes, 560.)

The same writer says that, as forming the subject of property in connection with realty, water may be viewed in two lights: one, as one of the elements of which an estate is composed; the other, as being valuable alone for its use, to be enjoyed in connection with the occupation of the soil. "In the latter sense it constitutes an incorporeal hereditament, to which the term 'easement' is (has been) applied." (Washburn on Easements and Servitudes, 207.) The flow of the water to and over the riparian lands is not a mere easement. (*Stoker v. Singer*, 8 El. & B. 36.) But the riparian right, while more than an easement, may be said to include the qualities of an easement.

In section 801 of the Civil Code, among "land burdens, or servitudes upon land," are enumerated "the right of receiving water from land," and "the right of having water flow without diminution or disturbance of any kind,"—which last includes the right to have a natural watercourse flow, subject to such diminution as results necessarily from a reasonable use by a superior riparian proprietor.

It has been held that when the lower proprietor licenses the upper to divert water which would flow to the lands of the licensor, and the licensee has executed the license, the licensor does not grant the servitude within the prohibition of the statute of frauds, but rather is estopped from asserting any right in it. It is not necessary to enter into that question. Whether the executed license would or would not be an executed contract; whether the transaction would or would not operate a

transfer from the licensor to the licensee, section 811 of the Civil Code declares that the effect is to "extinguish" the servitude. The legislature had as much power to make this enactment as to pass a statute of frauds.

The possession of the Kern Valley Water Company, at the points where water was taken, was perhaps some evidence of its riparian ownership. But if the act is to be done by the licensee on a third person's estate, and the license be executed, it cannot be revoked. (Washburn on Easements and Servitudes, 563.)

Appellants claim that the evidence with respect to the consent of plaintiffs to the diversion by the Kern Valley Water Company was not admissible under the allegations of the answer, because defendant did not plead therein the facts establishing license and its execution. Counsel refer to *Humphreys v. McCall*, 9 Cal. 59, 70 Am. Dec. 621, where it was held, in an action for damages for the diversion of water appropriated by plaintiffs on the public lands,—the defendants having pleaded the general issue only,—that it was not competent for the defendants to prove that a prior claim to the water existed in a third person, but that such defense should have been specially pleaded. That case turned on a priority of occupation as between the plaintiffs and defendants, and even if a still earlier occupation by a third person had been pleaded, it would have constituted no defense to an action brought for a diversion of water appropriated by plaintiffs previous to any appropriation by the defendants, unless the defendants connected themselves with the third person,—the first appropriator. In the case now before us, it was for the plaintiffs to show that they were entitled to the flow of the stream, or of some part of it, when this action was commenced. If their right to the flow was legally extinguished prior to the commencement of the action, we cannot perceive why defendant was not entitled to prove the fact under the denials of the answer.

If, therefore, the findings last above referred to are sustained by the evidence, or there is a substantial conflict in the evidence with respect to the matters set forth in those findings, the judgment and order must be affirmed.

It is to be observed that plaintiffs count upon their ownership of the banks of Buena Vista slough. If they licensed the Kern Valley Water Company permanently to divert the waters from the slough, and by expenditures on the part of the company the license was executed, plaintiffs cannot recover, whatever the purposes of the diversion, although these included a purpose to benefit the lands of plaintiffs by draining them, and the conduct of the water to a point below such lands, or even a purpose to irrigate the plaintiffs' lands through gates in the canals of the company at points separated from the channel of the slough. However, it might be (supposing plaintiffs had counted on their ownership of the banks of one of the canals), if it appeared that all the stock of the Kern Valley Water Company was owned by the riparian proprietors below the places of diversion of water from the slough,—so that the corporation might be treated as the mere instrumentality through which the riparian proprietors carried out a design agreed upon among themselves, to change the channel of the slough in such manner as to provide more effectually for the irrigation of their lands,—here such facts do not appear from the findings or evidence. The corporation was a distinct entity, in which the plaintiffs were in no way interested, except that there was evidence tending to prove that one (perhaps all) of them was a stockholder in it. Besides, as we have seen, the plaintiffs do not base their claim for relief on the statement in their bill of complaint that they are riparian proprietors on the new or artificial watercourse.

If, however, it should be conceded that all the plaintiffs consented to and approved of the construction by the Kern Valley Water Company of the dam or levee across the swamps immediately below the east side and Kern Valley Water Company's canals, this fact of itself would not entirely extinguish the rights of plaintiffs to the flow of the watercourse, unless the dam—as built and consented to by plaintiffs—obstructed and prevented the natural flow of every portion of the water (except, perhaps, mere leakage) through Buena Vista slough to the land of the plaintiffs.

The court below found that the levee made by the Kern Valley Water Company prevented “the natural flow of any

water into, through, or over said swamp northward of said levee," and that after the construction of said levee or dam, "no water has naturally flowed, or could flow, northward and beyond the head of said canals to or upon said land of the plaintiffs, or any part thereof."

But there was uncontradicted testimony that there was a headgate in the dam or levee, at a place designated by the witnesses as the place where the levee crossed the slough, which was at times open and through which, when open, water flowed in the slough.

The court did not find the existence of the headgate, and there is neither finding nor definite and distinct evidence from which can be ascertained what was the arrangement or agreement between the plaintiffs and the water company, if any, with reference to the control and management of the headgate. The court found that the plaintiffs consented to the building of the dam, and found that, as built, the dam entirely obstructed the flow of the water.

It is urged by appellants that the very fact of the existence of the headgate in the slough unexplained proves that plaintiffs retained a right to water flowing there. But it is enough if the facts proved do not affirmatively establish that the easement was entirely extinguished. The levee as constructed did not permanently and continuously stop the flow of all the water, and the license of plaintiffs was no broader than its execution.

Although the defendant was not bound to plead a license given and executed prior to the commencement of the suit, the burden was on the defendant of proving that plaintiffs had assented to acts of the Kern Valley Water Company which permanently deprived them of all the water. It was by such assent only that they could estop themselves from claiming the benefit of any of the water.

It may be contended, on behalf of respondent, that the presumption is that the gate built by the Kern Valley Water Company, as part of its work, was under the control of the company, and in the absence of evidence of a reservation by plaintiffs of a right to enter upon the possession of the company and open the gate,—or of a right to demand that the Kern Valley Water Company should open it whenever plain-

tiffs might choose to exercise the right, or open it at definite times or for certain periods,—the court below was justified in finding that plaintiffs consented to a permanent occlusion of all the waters; and that such finding included and implied a finding that the license was not limited or restricted.

The question is not free from difficulty. It is apparent the court below considered the facts that the headgate was there, that it was at times open, and that when open water flowed through it, as immaterial factors in the evidence, on which it based its conclusion that the dam as erected and assented to entirely obstructed the flow of the stream. The court in effect held that it was for the plaintiffs to prove affirmatively the reservation of a right to the flow at their option or at specified times. Doubtless, the conclusion that plaintiffs licensed a diversion of all the waters was based in part upon the presumption (in the absence of evidence to the contrary) that it was intended the water company should have entire control of its own headgate; but this, it is argued, is a presumption of fact which the court could properly indulge.

Suppose the single issue between these parties was, whether the license was general, extending to all the waters, or was limited, the burden of showing its general character being on the defendant. In such case, it might be asked, would not the defendant have made out its case, *prima facie*, at least, by proving the consent of the plaintiffs to the construction of the levee, although it was built with a gate through which waters might flow if it should be opened? Would the possible fact—not proved—that plaintiffs may have reserved the right to have the gate opened when they demanded it, or for a definite part of future time as time should pass, be considered as overcoming the presumption that the Kern Valley Water Company has the control of its own property? If so, it may be claimed, the case must constitute an exception to the general rule that the burden of proof is cast upon the opposite party when the party having the affirmative has established the issue on his part *prima facie*.

But here the burden was on the defendant of proving that the right of the plaintiffs to the flow of all the water was extinguished. It would not have been sufficient that it was

made to appear that plaintiffs had assented to a diversion of a portion of the waters, any more than it would have been sufficient to prove that plaintiffs had granted a portion of the waters. In either case the plaintiffs would not have lost nor parted with the right to be protected in the enjoyment of the waters they retained.

Until it was made to appear that plaintiffs had lost the right to the flow of any part of the stream, the presumption would be that they retained a right to all. And in presence of the fact that the work they assented to did not actually deprive them of all the water, their right to the water which flowed through the gate, either continuously or at intervals, was not extinguished. To apply the presumption that every man has a right to control his own property for the benefit of the defendant alone is to assume, not only that the gate belonged to the Kern Valley Water Company, but that the water also (or its exclusive use) which flowed through the gate belonged to that company, in entire disregard of the presumption that the plaintiffs retained every right to the flow of the stream which was not affirmatively shown to have been lost. Thus a disputable presumption (applicable to the use of the gate) would be made to overthrow a presumption applicable to the use of the water. The defendant could not establish that plaintiffs were estopped from asserting that they had a right to the flow of any part of the water,—either *prima facie* or conclusively,—except by proving facts which necessarily precluded the retention by plaintiffs of any part of it. The defendant could not rely upon a presumption drawn from facts which did not necessarily exclude a retention by plaintiffs of a right to the flow of some of the waters, in opposition to the legal proposition that plaintiffs had lost only the right which was affirmatively proved to have been extinguished.

Of course, on a retrial of this cause the evidence may establish an extinguishment of the plaintiffs' rights—if they ever had any—to the flow of every portion of the waters of Buena Vista slough to their lands. On this appeal we confine ourselves to the findings and testimony in the transcript now here.

III. While the argument *ab inconvenienti* should have its proper weight in ascertaining what the law is, there is no "public policy" which can empower the courts to disregard the law; or because of an asserted benefit to many persons (in itself doubtful) to overthrow the settled law. This court has no power to legislate,—especially none to legislate in such manner as to deprive citizens of their vested rights.

The riparian owner's property in the water of a stream may (on payment of due compensation to him) be taken to supply "farming neighborhoods" with water.

In case further legislation shall be deemed expedient for the distribution of water to public uses (the private right being paid for), the validity of such further legislation is to be determined after its enactment, if its validity shall then be questioned.

The respondent contends that it is entirely immaterial what errors were committed by the court below, upon the supposition that plaintiffs, as riparian proprietors, have some rights to the flow of the stream through their lands,—since the plaintiffs have in fact no right to the use of the waters as against the defendant, which has appropriated them in accordance with the provisions of the Civil Code; and this, notwithstanding the statute of 1850, adopting the common law as "the rule of decision," and the section of the Civil Code providing that "the rights of riparian proprietors are not affected" by the provisions relating to appropriations of waters. (Sec. 1422.)

This court has held that the property of a riparian owner in the waters flowing through his land may, upon due compensation to him, be condemned to the public use by proceedings initiated by a corporation organized to supply a town with water. (*St. Helena Co. v. Forbes*, 62 Cal. 182, 45 Am. Rep. 659.)

In the learned opinions of Justices Ross and Myrick in that case, the right of the riparian proprietor to the use of the water is designated "property," an "incident of property in the land inseparably annexed to the soil," as part and parcel of it, "an incorporeal hereditament appertaining to the land." The main question in the case was whether the code provided

for a condemnation of that species of property to public uses. The question was answered in the affirmative.

And it has been held in New York that the taking of a stream of water (on due compensation) for the supply of a town was a proper exercise of the power of eminent domain. (*Gardner v. Newburgh*, 2 Johns. Ch. 162, 7 Am. Dec. 526.) On like principles, the same property right may be taken for any public use. In every case, however, the provisions of the statute as to the mode and manner of conducting the condemnation proceedings must be strictly pursued. Private property may be taken or damaged for public use, due compensation being made or paid into court. (Const., art. 1, sec. 14.) But another provision of the supreme law is equally operative: "No person shall be deprived . . . of property without due process of law." (Id., art. 1, sec. 13.) A legislative act declaring the necessity for taking the property for public use, or the judgment of a court that the necessity exists when the statute puts the power in a court, is "the law of the land." (Cooley's Const. Lim. 528.)

Section 1001 of the Civil Code provides:

"Any person may, without further legislation, acquire private property for any use specified in section 1238 of the Code of Civil Procedure, either by consent of the owner or by proceedings had under the provisions of title 7, part 3, of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such title is 'an agent of the state,' or a 'person in charge of such use,' within the meaning of those terms as used in such title. This section shall be in force from and after the fourth day of April, 1872." . . .

Now, the drinking of water is everywhere spoken of as a "natural," or at least primary, use. Yet, when water is entirely taken away from the riparian proprietor to supply a city or town, the use of it has never been limited to that which may be required merely for the support of the lives of the citizens; but the water thus appropriated to the "public use" may be consumed also for lavation, and for all other purposes to which the element is ordinarily applied, as for irrigating private plats or yards and public squares and parks, the water-

ing of the streets, etc. It would seem utterly impracticable to limit the uses to which the citizens or villagers may apply it; or to the quantity to be used by each, except by reference to the quantity introduced. In such cases, the riparian proprietor may be deprived of its use for primary purposes that it may be devoted to such as have generally been deemed secondary. Why, then, may he not be deprived of the water when the lawmakers decide that its application elsewhere for irrigation is a public use?

It is the rule that, where there is any doubt whether the use to which the property is proposed to be devoted is of a public or private character, it is a matter to be determined by the legislature; and the courts will not undertake to disturb its judgment in that regard. (*Stockton V. R. Co. v. Stockton*, 41 Cal. 147.) To this yielding to the legislative judgment there is but one exception; that is, when the property of the citizen is taken, or sought to be taken, for a use in no sense public; or, in the language of Chancellor Walworth (*Varick v. Smith*, 5 Paige, 159), "where there is no foundation for a pretense that the public is to be benefited thereby." (*Consolidated Channel Co. v. Central Pac. R. Co.*, 51 Cal. 269.)

We are not prepared to say that the supply of water to "farming neighborhoods" for irrigation (and the code evidently means for irrigation) may not be for a public use. Indeed, in view of the climate and arid soil in parts of the state (for this object climate and soil may properly be considered), it is safe to say that the supply for such use may be that which the legislature has decided it to be,—a public use. The judgment of the legislature that it is such ought not, therefore, to be disturbed by the courts.

It is apparent that in deciding whether a use was public the legislature was not limited by the mere number of persons to be immediately benefited as opposed to those from whom property is to be taken. It must happen that a public use (as of a particular wagon or railroad) will rarely be directly enjoyed by all the denizens of the state, or a county or city; and rarely that all within the smallest political subdivision can, as a fact, immediately enjoy every public use. Nor need the enjoyment of a public use be unconditional. A citizen of a municipality

to which water has been brought by a person or corporation which, as agent of the government, has exercised the power of eminent domain, can demand water only on payment of the established rate, and on compliance with reasonable rules and regulations.

And while the court will hold the use private where it appears that the government or public cannot have any interest in it, the legislature, in determining the expediency of declaring a use public, may no doubt properly take into consideration all the advantages to follow from such action; as the advancement of agriculture, the encouragement of mining and the arts, and the general though indirect benefits derived to the people at large from the dedication.

It may be that, under the physical conditions existing in some portions of the state, irrigation is not, theoretically, a "natural want"—in the sense that living creatures cannot exist without it. But its importance as a means of producing food from the soil makes it less necessary, in a scarcely appreciable degree, than the use of water by drinking it. The government would seem to have not only a distant and consequential, but a direct, interest in the use,—therefore a public use.

The words "farming neighborhoods" are somewhat indefinite; the idea sought to be conveyed by them is more readily conceived than put into accurate language. Of course, "farming neighborhood" implies more than one farm; but it would be difficult to say that any certain number is essential to constitute such a neighborhood. The vicinage may be nearer or more distant, reference being had to the populousness or sparseness of population of the surrounding country; but the farmers must be so near to each other—relatively to the surrounding settlers—as to make what in popular parlance is known as a "farming neighborhood."

A very exact definition of the word is not, however, of paramount importance. The main purpose of the statute is to provide a mode by which the state, or its agent, may conduct water to arable lands where irrigation is a necessity, on payment of due compensation to those from whom the water is diverted.

The same agent of the state may take water to more than one farming neighborhood.

It must always be borne in mind that under the codes no man (or set of men) can take another's property for his own exclusive use.

Whoever attempts to condemn the private right must be prepared to furnish (to the extent of the water he consumes and pays for) every individual of the community or communities, farming neighborhood or farming neighborhoods, to which he conducts it, the consumers being required to pay reasonable rates and being subjected to reasonable regulations. And whether the quantity sought to be condemned is reasonably necessary to supply the public use in a neighborhood or neighborhoods must be determined by the court in which the proceedings are brought for condemnation of the private right. . . .

The Civil Code authorizes any person, for purposes useful to himself alone or for the benefit of himself and others, to divert the waters of a stream, the rights of riparian proprietors not being affected.

The claim of respondent is, that under the provisions of the code, any person may divert all the waters of a stream from the lower lands, conduct them to a distant place beyond the watershed, and, whatever the additional loss by seepage and evaporation caused by a change of the channel, apply them either to his own purposes or sell them to others, the only conditions being that he shall appropriate them in the manner prescribed by the code, and that they shall be used for an object beneficial to somebody. (Civ. Code, sec. 1411) . . .

The proposition is simply that, by imperative necessity, the right to take or appropriate water should be held paramount to every other right with which it may come in conflict.

But the policy of the state is not created by the judicial department, although the judicial department may be called upon at times to declare it; it can be ascertained only by reference to the constitution and laws passed under it, or, which is the same thing, to the principles underlying and recognized by the constitution and laws.

The contest here is between persons who, as in every other litigation, may be said indirectly to represent other persons

or classes of persons having interests like those of the respective parties, since the decision in this case may establish a rule which shall determine the rights of other persons holding positions, relatively to each other, like those of the plaintiffs and defendant herein. Even if the greater number whom it is assumed will be benefited by making the interests of non-riparian takers or appropriators paramount shall also be assumed to constitute "the public," while riparian proprietors, however numerous, shall be treated merely as individuals having interests adverse to the public—this consideration, if it should ever have weight with judicial tribunals, should have weight only in very doubtful cases. . . .

If the law is settled, we cannot override the established rule to secure some conjectural advantage to a greater number. If, however, we were permitted to do this, the inquiry would still remain whether the recognition of a doctrine of appropriation (such as is contended for by respondent) would secure the greatest good to the greatest number. Observe, if that be the true rule, the appropriator does not necessarily act as the agent of the state employing the power of eminent domain for the benefit of the public, but by his appropriation makes the running water his own, subject only to the trust that he shall employ it for some useful purpose. It would hardly be contended that while he continues to use it for a useful purpose a statute would be valid which should take it from him, without indemnification, under a pretext of regulating the "common use" of the water more profitably, or of providing for its distribution so as to benefit a greater number of persons. He would have a vested right to the use of the water, although the riparian proprietors would have none. If, indeed, one who has appropriated the water of a stream since the adoption of the present constitution has appropriated it "for sale, rental, or distribution" to others, the rates he may charge consumers must be fixed by local authority. (Const., art. 14, sec. 1.) But if he shall consume the water himself, one may thus, for his own benefit, arbitrarily deprive many of an advantage, which, whether technically private property or not, is of great value, and thus secure to himself that which, by every definition, is a species of private property in him. Riparian lands are irrigated naturally by the waters

percolating through the soil and dissolving its fertilizing properties. This is sufficiently apparent from the consequences which ordinarily follow from a continual cessation of the flow of a stream. If, in accordance with the law, such lands may be deprived of the natural irrigation without compensation to the owners, we must so hold; but we fail to discover the principles of "public policy" which are of themselves of paramount authority and demand that the law shall be so declared. In our opinion, it does not require a prophetic vision to anticipate that the adoption of the rule, so called, of "appropriation" would result in time in a monopoly of all the waters of the state by comparatively few individuals, or combinations of individuals controlling aggregated capital, who could either apply the water to purposes useful to themselves, or sell it to those from whom they had taken it away, as well as to others. Whether the fact that the power of fixing rates would be in the supervisors, etc., would be a sufficient guaranty against overcharges would remain to be tested by experience. Whatever the rule laid down, a monopoly or concentration of the waters in a few hands may occur in the future. But surely it is not requiring too much to demand that the owners of lands shall be compensated for the natural advantages of which they are to be deprived.

It is admitted that a single riparian proprietor would stand on the same footing as one not such. But the concession would still leave the rule in force, "First come first served."

It has been assumed that there is no medium between the rule contended for and what has been said to be the rule of the common law, which requires that the stream shall flow "undiminished in quantity" past the lands of all the riparian proprietors. And it has sometimes been gravely argued that, unless the doctrine of appropriation shall prevail, the owner of lands near the mouth of a stream may not only fail to use the waters himself, but will have power to refuse to permit any other person to employ them.

We have already said that the right to the water of the riparian proprietor may be taken for a public use, on due compensation to such proprietor. And it will be noted (since the defendant is not a riparian proprietor unless made such by the mere fact of its appropriation) that the exigencies of the pres-

ent case do not imperatively demand that we shall here determine the respective rights of riparian owners as between themselves. But even if the defendant is to be treated as a riparian proprietor with reference to the specific tract in which is the head of its canal, we entertain no doubt, upon principles of the common law, as applied to the conditions here existing, that each riparian proprietor is entitled to a reasonable use of the water for irrigation. This statement has its bearing on the alleged public policy, which, it is claimed, should control when the alternative is presented between "appropriation" and the nonuse for irrigation, or like purposes, by any person. What is a reasonable use by a riparian occupant—reference being had to the use required by the others—must depend upon the circumstances of each particular case. This cause was not tried on the theory that defendant was a riparian owner. There is no pretense that the water diverted was necessary for, or was used for, the reasonable irrigation of the specific tract at the head of defendant's canal.

Counsel do not seem to agree as to the nature and pervading force of the "public policy" relied on. While on the one hand it has been suggested that policy demands the recognition of the doctrine of "appropriation," so called (a doctrine which would give to the prior appropriator the right to divert, without compensation, all the waters flowing to inferior riparian owners), throughout the state, counsel appearing as *amici curiae* urge that different public policies obtain in different portions of the state. In view of this assumed fact, it is said it should be held that the streams in the more arid portions of California may be entirely diverted by the prior appropriator, as against those below, and that the common-law rights of riparian proprietors should prevail in the regions in which the climate more nearly resembles that of other states where the common-law rule is enforced. The aridity of the soil and air being made the test, the greater the aridity the greater the injury done to the riparian proprietors below by the entire diversion of the stream, and the greater the need of the riparian proprietor the stronger the reason for depriving him of the water. It would hardly be a satisfactory reason for depriving riparian lands of all benefit from the flow, that they would thereby become utterly unfit

for cultivation or pasturage, while much of the water diverted must necessarily be dissipated. No precise line of separation between the regions so characterized is pointed out, and the attempted classification is itself somewhat uncertain and indefinite. It would seem there could be no doubt that the law, derived from the same sources, is the same everywhere in California. Were the theory of counsel accepted, would the courts take judicial notice of the physical conditions, in an undefined district, which would compel the adoption of one rule rather than the other? Or would the matter be submitted to the trial court or a jury, upon evidence, to be determined as a question of fact? If the theory were accepted, parties to a litigation would be subjected to one or another law, as it might be deemed by court or jury, in the particular case, that it was for the interest of the neighborhood (or large "region," as the case might be) that the rights of the parties should be settled by the one law or the other. Perhaps, too, the law with respect to appropriators and bank owners on the same stream would vary with the changing seasons. And if the issue as to the applicability of one law or another were submitted as a question of fact, two different laws might obtain and determine the rights of parties in different suits, as the evidence adduced with respect to physical conditions of the "region" should bring home to the minds of the triers one conviction or another. Certainly, a judgment in a particular case (if the question would be one of fact) would not be binding upon all the residents of the region, nor determine what law prevailed therein. We can conceive of no "public policy" which should compel us to abandon the rights of the citizen to the whim or caprice, or to the deliberate and honest judgment, of the arbiter in each separate case. Whatever is the general law bearing on the subject, it is the same everywhere within the limits of the state. It is for the court to apply, or to direct a jury to apply, the appropriate rule to the facts proved by the evidence bearing upon the issues made by the pleadings, but neither court nor jury can say that it is expedient to declare that a law shall be operative in one portion of the state which differs from the law in other portions, or to decide that there is no general law bearing on the subject.

IV. By the law of Mexico the running waters of California were not dedicated to the common use of all the inhabitants in such sense that they could not be deprived of the common use.

We have been warned lest in approaching the subject we shall assume that, in the very nature of things, running waters are inseparably connected with the riparian lands. It may be conceded that if riparian owners have any right in the waters (or in the lands themselves), it is such as is created or recognized by the law of the land. It is at least equally true, however, that every inhabitant of a state or district does not possess a potential right, inherent in his habitancy, to divert so much of the waters of a stream as he may have occasion to employ. The whole matter depends upon the law of the country, written or unwritten.

Counsel for respondent announce the proposition: "The fundamental principle upon which all the laws of the former governments of this territory upon this subject (waters and their uses) were based, will be found to be that the flowing waters of the streams and rivers of the country were dedicated to the common use of the inhabitants, subject to that legislative control which is the equivalent of the exercise of that legislative power which we know as the police power of the state."

We understand this to mean that the "inhabitants" of the territory, or at least the occupants of lands in each valley or watershed capable of irrigation from a stream flowing in it, had under the Mexican law a vested interest in the common use for irrigation and like purposes to which the waters were "dedicated," which could not be taken away by the legislative power; that the dedication continues to the present hour; that the state of California has no power to restrict the use to riparian proprietors; that the statute of 1850 adopting the common law "as the rule of decision" is not to be construed as an attempt so to restrict the use, and if it must be thus construed, it is invalid to that extent, since the power of the state is limited to the mere regulation of the common use. . . .

It may be conceded that, when under the former government property was dedicated to the public use, either by a private person or the nation, the people comprising the public and

their successors acquired a vested interest—of which they cannot be arbitrarily deprived—to the extent of the common use to which the property was dedicated. But it would seem to be difficult to derive the right to the exclusive use of the whole or portions of the waters of a stream from their dedication to the common use of all. We shall see that the laws of Mexico authorized the diversion of waters for the exclusive benefit of corporations and individuals under some circumstances. The provisions of our Civil Code authorize such diversions for exclusive use. It cannot be successfully argued that laws authorizing such exclusive appropriations are less an infringement of the “common use” to which rivers were devoted than a law limiting the use of the waters to riparian proprietors.

And this leads to an inquiry as to the nature of the common use of running waters under the Mexican law.

In the Institute of Justinian, it is declared, concerning things: “They are the property of some one or no one.” (“*Vel in nostro patrimonio vel extra nostrum patrimonium.*”) “Some are, by natural right, common to all; some are public; some are of corporate bodies (cities—*municipia*); and some belong to no one. Many are the property of individuals, acquired in divers ways,” etc. (Lib. 2, tit. 1.) “The things which by natural law are common to all are these: air, running water (*aqua profluens*), the sea, and as a consequence, the shores of the sea.” (Id., sec. 1.) “*Flumina autem omnia et portus publica sunt.*” (Id., sec. 2.) The Roman law distinguished between *res communes* and *res publicæ*. The sea was included amongst the former, the rivers amongst the latter. (Halleck’s International Law, p. 147, notes.) All perennial rivers were public. (Dig. 43, 12, 3.) Such rivers were of the class of things “*publico usui destinatæ*,” like ports and roads. (Moyle’s Ed. Insts., p. 184, note.) . . .

By the Mexican law the property in rivers pertained to the nation, the use of the inhabitants. The nature of this use will be considered hereafter. . . .

The common use of the waters, it would seem, existed only while they continued to flow in and constituted a portion of the river. But under the Mexican law an exclusive use of parts or the whole of the waters of a river might be legally acquired by individuals. . . .

By the Mexican Civil Code of 1870, it is provided: "The property in waters which pertains to the state does not prejudice the rights which corporations or private individuals may have acquired over them by legitimate title, according to what is established in the special laws respecting public property. The exercise of property in waters is subject to what is provided in the following articles." (Art. 1066.) In Guerra's *El Código Civil, in Forma Didáctica*, the word "private" is inserted after the word "property," so as to make the last sentence of the article read: "*El ejercicio de la propiedad privada de las aguas, esta sujeto,*" etc. If, as is suggested by counsel, the presumption is, that the provisions of the code are declaratory of the pre-existing law, the right which could be acquired under the laws, to the separate use of the portions of a stream, constituted an exclusive usufruct of the nature of private property, which did not, and could not, coexist with a common use of such waters by all. As we have seen, running water is capable of appropriation as private property, independent of any common use, where the quantity of water is so small as to be incapable of being fully enjoyed without exclusive possession. The exclusive appropriation is put in opposition to the common use. (Bowyer, *supra*.) . . .

The Mexican government prohibited any diversion or obstruction of the waters of a river, by riparian proprietors or others, which should interfere with navigation. . . .

Interference with the appropriate common use of innavigable rivers was not thus absolutely prohibited by the Mexican law. The common use of the waters of such rivers by all who could legally gain access to them continued only while the waters legally flowed in their natural channel. And the power of determining whether the public good—the purposes for which the social state exists—demands that the use of the whole or portions of the waters should pass as an exclusive right to one or a class of individuals remained in the sovereign. Whether the power is an incident to the ultimate domain or right of disposing of the property of the state, or is to be referred to some other source or principle, the Mexican government employed the power of permitting the diversion of waters from innavigable rivers by those not riparian proprietors, upon such

terms and conditions, and with such limitations, as were established by law, or by usages and customs which had the force of law. That government saw fit to concede private rights to the exclusive use of the waters of such streams. It had power to do this even if the consequence should be the entire deprivation of the common use.

It may be said that the Mexican laws which provided for such concessions to individuals or corporations did not provide for grants to such persons, but were themselves a recognition of a right in all to a use of the waters. . . .

Those who appropriated and diverted the waters of an navigable river, in accordance with the laws, obstructed *pro tanto* its common use. Nevertheless, they acquired an exclusive right to the use of that which they diverted, because, if they complied with the established conditions, their rights were acquired under and in accordance with law, and the waters they diverted were no longer portions of the waters of a river, or subject to the common use.

No one of such had any right in or to the water until he had complied with the conditions which authorized him to appropriate it. Every one of such who complied with the conditions, and appropriated water, acquired a vested right in such water. at least while he continued to use it, except in the single case where he acquired a right merely conditional, under laws which reserved the power in the agents of the state or municipality to deprive him of it without indemnification. It may be conceded that one who had acquired the right to the exclusive use of a portion of the waters of a river under the Mexican régime could not be deprived of his right by a law of California. But can it be said that all the inhabitants of the state, or of a valley through which a stream flows, have such a vested right in the use of the waters which some of them (on performance of the conditions prescribed by Mexican law) might have appropriated, but never did appropriate?—this on the theory that the waters had been dedicated to the common use of all. It would be a dedication never accepted by those to whom it was made, and a dedication to a common use which could never be enjoyed in common. . . .

The property of the nation is in the river and its bed, while it is the bed of the river; the common use continues while

the water is the water of a river. But a private right to the exclusive use of the waters could be acquired under the Mexican law by prescription, or on compliance with the established conditions; and the general property of the nation in running waters did not prejudice such special private rights.

Conceding the provisions of the Civil Codes of 1870 and 1884 to be declaratory of the law as it existed when California was ceded to the United States, they do not confer nor recognize any inherent vested right, enforceable in the courts, in others than riparian proprietors, to the use of any portion of the waters of a stream, nor any right, except as to those who actually appropriate waters in the manner and on the conditions prescribed by the laws. It may be that the Mexican system implies a recognition of an imperfect obligation or moral duty on the part of the government to provide for the distribution of the waters in such manner as to encourage the settlement of the country, develop manufactures, and benefit agriculture. In this view it would seem that the laws were inspired with a liberal spirit, and were well calculated to advance those objects.

By the codes the owner of an estate in which there is a natural spring may use or dispose of its waters, subject only to condemnation for public use on compensation to the owner.

. . .
The laws of Mexico relating to pueblos conferred on the town authorities the power of distributing, to the common lands and to its inhabitants, the waters of an innavigable river on which the pueblo was situated. It is not necessary to say that the property of the nation in the river, as such, was transferred to the pueblo, but it would seem that a species of right to the use of all its waters necessary to supply the domestic wants of the pobladores, the irrigable lands and the mills and manufactories within the general limits, was vested in the pueblo authorities, subject to the trust of distributing them for the benefit of the settlers. . . .

Each pueblo was *quasi* a public corporation. By the scheme of the Mexican law, it was treated as an entity, or person, having a right as such, and by reason of its title to the four leagues of land, to the use of the waters of the river on which it was situated, while as a political body it was vested with

power, by ordinance, to provide for a distribution of the waters to those for whose benefit the right and power were conferred. . . .

Thus by virtue of the laws each person having land within the pueblos was permitted to conduct water to it (obtaining the consent of the owners of the lands between his and the river), provided, by so doing he did not violate the municipal ordinances giving destination or distributive use to the waters.

By its terms this permission was accorded only to the inhabitants of the pueblo, and could be acted on only in such manner as should not interfere with municipal ordinances. . . .

From the foregoing it appears that the riparian proprietor could not appropriate water in such manner as should interfere with the common use or destiny which a pueblo on the stream should have given to the waters; and semble, that the pueblos had a preference or prior right to consume the waters even as against an upper riparian proprietor. The common use here spoken of is the use for the benefit of the community or inhabitants of the pueblo, whose interests as a whole were to be considered in the distribution of the waters by the officers of the pueblo. (Plan of Pitic, sec. 20.) It is not necessary here to decide that the pueblos had the preference above suggested. Nor is it necessary here to speak of the relative rights of two or more municipalities on the same stream. In such case (whatever the standard by which were to be determined the relative rights of the pueblos respectively as to quantity of water), it would seem clear that the municipal regulations of each, with respect to the application and distribution of water, would be of force only within its own boundaries. But there could be no municipal ordinance of a pueblo regulating or distributing the waters of a stream amongst its inhabitants, or other persons, until a pueblo was established. We take notice that no pueblo existed on the watercourse (if any there be) which is the subject of the present controversy. No portion of its waters were therefore dedicated or devoted to the use of the inhabitants of a pueblo by virtue of the laws giving to pueblos the power of distributing waters. . . .

Thus the waters of innavigable rivers, while they continued such, were subject to the common use of all who could legally

gain access to them for purposes necessary to the support of life, but the Mexican government possessed the power of retaining the waters in their natural channel, or of conceding the exclusive use of portions of them to individuals or corporations, upon such terms and conditions, and with such limitations, as it saw fit to establish by law.

The respondent here is not the successor in interest of an individual or corporation which acquired a property in the exclusive use of waters by compliance with the conditions prescribed by the laws of Mexico, or in accordance with municipal ordinances or regulations, or under any custom of the country. No city or pueblo existed on the alleged stream, and at the trial hereof no evidence was given of any special or general custom with respect to the particular stream or with respect to all rivers in California. No general custom existed. Moreover, if it had ever existed it would have continued only until abrogated by legislation. . . .

V. Upon the admission of California into the Union, this state became vested with all the rights, sovereignty, and jurisdiction in and over navigable waters, and the soils under them, which were possessed by the original states after the adoption of the constitution of the United States.

Since the admission of California into the Union, the public lands of the United States (except such as have been reserved or purchased for forts, navy-yards, public buildings, etc.) are held as are the lands of private persons, except that they cannot be taxed by the state, nor can the primary disposition of them be interfered with. . . .

VI. Since, if not before, the admission of California into the Union, the United States has been the owner of all innavigable streams on the public lands of the United States, within our borders, and of their banks and beds.

A grant of public land of the United States carried with it the common-law rights to an innavigable stream thereon, unless the waters are expressly or impliedly reserved by the terms of the patent, or of the statute granting the land, or unless they are reserved by the congressional legislation authorizing the patent or other muniment of title. . . .

✓ VII. The state of California became the owner of the swamp lands described in the complaint herein, on the twenty-eighth day of September, 1850. . . .

VIII. It has never been held by the supreme court of the United States, or by the supreme court of this state, that an appropriation of the water on the public lands of the United States (made after the act of Congress of July 26, 1866, or the amendatory act of 1870) gave to the appropriator the right to the water appropriated, as against a grantee of riparian lands under a grant made or issued prior to the act of 1866; except in a case where the water so subsequently appropriated was reserved by the terms of such grant.

Since, as before, September 28, 1850, the United States has been the owner of lands in California with power to dispose of the same in such manner and on such terms and conditions (not interfering with vested rights derived from the United States) as it deemed proper. But neither the legislation of Congress with respect to the disposition of the public lands, nor its apparent acquiescence in the appropriation by individuals of waters thereon, subsequent to the act of September, 1850, granting the swamp lands to the state, can affect the title of the state to lands and waters granted by that act.

Neither the supreme court of the United States nor the supreme court of California has ever held in opposition to this view. . . .

IX. The rights of the state under the grant of September 28, 1850, do not depend upon, nor are they limited by, the decisions of the state courts with respect to controversies upon the public lands of the United States. Those decisions do not enter into nor operate upon the subsequent legislation of Congress in such manner as to require that the legislation (or its affirmance of rights recognized by the state courts as existing between occupants upon the public lands of the United States) must be construed as an attempt to deprive the state of its vested rights.

• If the decisions mentioned can be referred to for any purpose, semble: That the occupant of a tract of riparian land (arable or grazing) on the public domain is by such decisions presumed to have received a grant of the flowing water, to

the extent of the common-law right to the use of such water as it flows through the land.

And if the doctrine as to adverse claims upon the public lands as declared by these decisions be extended to lands granted to the state, it cannot affect the title or estate of grantees of the state (the water not being reserved in the grants or in the legislation authorizing the grant). The doctrine is applicable alone to actions in which both parties claim only by possession.

X. The common law as to the riparian right was not abrogated by certain statutes of the state, applicable to a district of country within which is included the county of Kern; nor was the state estopped by such statutes from asserting its right to the flow of a natural stream from that district to and over the lands granted to the state by the act of Congress of 1850.

From what has been said, it appears that the respondent has not derived from the United States a right to divert the water of a flowing stream from the lands granted to the state in 1850, or from the premises of a grantee of the state to a portion of those lands. It is in order to inquire whether the state itself has authorized such diversion.

It is claimed that, so far as the territory comprised within Kern county is concerned, the common-law doctrine of riparian rights—if it ever existed—does not exist, but has been repealed, and the law of “appropriation” adopted by certain statutes.

The county of Kern was created by the act of April 2, 1866, which took effect June 2, 1866. It was formed of portions of Tulare and Los Angeles counties. On the fifteenth day of May, 1854, an act was passed (Stats. 1854, p. 76) providing for the election in each township of certain counties (including Tulare and Los Angeles) of a board of three “water commissioners” and an overseer. The commissioners were to examine streams and apportion their waters “among the inhabitants of their district”; on petition to lay out and construct ditches, etc. The overseers were to execute the orders of the commissioners, superintend works directed by them, and see that the water was kept clear and the ditches in repair. Section 14 of the act provided: “No person or persons shall di-

vert the waters of any river, creek, or stream from its natural channel to the detriment of any other person or persons located below them on any such stream."

February 19, 1857, April 28, 1860, and again February 21, 1861, the act of May 15, 1854, was amended, but not so as to affect any question involved in the present case. (Stats. 1857, p. 29; Stats. 1860, p. 385; Stats. 1861, p. 31.)

The second, third, and fourteenth sections of the act of May, 1854, were amended by the act of April 10, 1862. (Stats. 1862, p. 235.) The second section, as amended, provided that the supervisors, instead of the county judge, should order the election of the commissioners, etc. The third section gave the commissioners power to determine what watercourses ought "to be appropriated to public use," to apportion the water, etc. And the fourteenth section, as amended—the third section of the amendatory act—declared: "No person or persons shall divert the waters of any river, creek, or stream from its natural channel, to the detriment of any other person or persons located below them on any such stream, unless previous compensation be ascertained and paid therefor, under the provisions of this act, or under the provisions of other laws of this state authorizing the taking of private property for public uses."

It would be difficult to invent a combination of words which would more explicitly recognize a property to the flow of the stream in the riparian owners below the point of diversion.

The statute of 1854 and the amendments authorized (or attempted to authorize) the commissioners to decide whether a watercourse should be condemned or "appropriated" to the public use, and to divert and apportion the water of the stream so appropriated. Evidently, by the persons who are not to be detrimented without compensation is meant the inferior riparian proprietors, whose property in the waters may be taken for the "public use" on payment of due compensation, according to the laws of the state "authorizing the taking of private property for public uses." If not they, whom else? The scheme, if valid, necessarily excludes any diversion at all, by a private person, of waters of a stream "appropriated to the public use" by the commissioners, and any diversion or appropriation through ditches other than those

made under the direction of the commissioners. The persons, then, who are prohibited from diverting water to the injury of those below, except on due compensation, are the commissioners and those acting under command of the commissioners.

Nor can it be said that everybody else might be made to suffer detriment, without compensation, by diversion of water by the commissioners, except only those persons who had "appropriated" waters of the stream prior to the act of 1854, and who continued to use the same. If the intention had been to protect, or rather to recognize the rights of that class only (if any such class existed), we cannot but believe that the purpose would have been expressed in appropriate language. The language of the provision is sweeping, and while perhaps broad enough to include nonriparian proprietors who had diverted water prior to the act, is peculiarly applicable, and certainly includes those who had acquired the title to riparian lands prior to a diversion, and also includes prior riparian occupants—"No person or persons shall divert," etc. The term "location" has been generally applied to occupations of portions of the public domain, while diverters of waters have been called, and throughout the elaborate briefs of counsel herein are called, "appropriators." The amendatory statute not only recognizes the riparian rights of those in possession of lands through which the stream "appropriated to public use" may pass, but is a legislative construction of the words (if any such construction were needed) found in the fourteenth section of the original act of 1854,—“to the detriment of any person or persons located below them on such stream.” . . .

XI. Section 1422 of the Civil Code (“The rights of riparian proprietors are not affected by the provisions of this title”) is protective, not only of riparian rights existing when the code was adopted, but also of the riparian rights of those who acquired a title to land from the state after the adoption of the code and before an appropriation of water in accordance with the code provisions.

Neither a grantee of the United States nor the grantee of a private person who was a riparian owner when the code was adopted need rely for protection on section 1422. Such persons are protected by constitutional principles.

The state might have reserved from her grants of land the waters flowing through them, for the benefit of those who should subsequently appropriate the waters. But the state has not made such reservation.

The water rights of the state, as riparian owner, are not reserved to the state by section 1422, because (wherever the state has not already parted with its right to those who have acquired from her a legal or equitable title to riparian lands) the provisions of the code confer the state's right to the flow on those appropriating water in the manner prescribed by the code.

It is contended by respondent that the Civil Code gives to it a right to the water superior to that of the riparian proprietor below; that, as against an appropriator under the code, one who has acquired a title to lands from the state (subsequently to the code, although prior to the water appropriation) has no right in or to any of the water.

Title 8 of part 4, division 2, of the Civil Code, reads:

"Sec. 1410. The right to the use of running water flowing in a river or stream, or down a canyon or ravine, may be acquired by appropriation.

"Sec. 1411. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases.

"Sec. 1412. The person entitled to the use may change the place of diversion if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made.

"Sec. 1413. The water appropriated may be turned into the channel of another stream and mingled with its water, and then reclaimed; but in reclaiming it the water already appropriated by another must not be diminished.

"Sec. 1414. As between appropriators, the one first in time is the first in right.

"Sec. 1415. A person desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein,—

"1. That he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure.

"2. The purposes for which he claims it, and the place of intended use.

"3. The means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it.

"A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted.

"Sec. 1416. Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain.

"Sec. 1417. By 'completion' is meant conducting the waters to the place of intended use.

"Sec. 1418. By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted.

"Sec. 1419. A failure to comply with such rules deprives the claimant of the rights to the uses of the water as against a subsequent claimant who complies therewith.

"Sec. 1420. Persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must, after this title takes effect and within twenty days thereafter, proceed as in this title provided, or their right ceases.

"Sec. 1421. The recorder of each county must keep a book, in which he must record the notices provided for in this title.

"Sec. 1422. The rights of riparian proprietors are not affected by the provisions of this title."

The fourth section of the Civil Code declares that the rule that statutes in derogation of the common law shall be strictly construed has no application to the code. And it is added, "The code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally

construed, with a view to effect its objects and to promote justice."

Counsel for respondent contend that section 1410 of the Civil Code promulgates a general law, declaring the doctrine of appropriation to be the law of the land, and argue that, if it be admitted the legislature could not divest the owner of the banks of a watercourse of his riparian rights, the doctrine of appropriation was adopted as the general law, and applicable to all public lands of the state and of the United States, from the point of time when section 1410 was enacted. And it is said the whole purpose of section 1422—"The rights of riparian proprietors are not affected by the provisions of this title"—is subserved by saving rights then vested.

It is argued that the words "rights of riparian proprietors" are used either in a generic sense, as indicating that principle of law known generally as the doctrine of riparian rights, or else they are used in the more limited sense of private rights of individuals who then (when the code was enacted) owned lands on the banks of streams whose source was on or which flowed over public lands. That it is too self-evident for serious question that the words cannot have been used in the more enlarged sense; for give them that interpretation, and you have, in the same statutory enactment, a declaration of two diametrically antagonistic principles,—the doctrine of appropriation and the doctrine of riparian rights,—doctrines which cannot coexist. But, it is said, giving the words the other and more restricted interpretation, each and all parts of the statute harmonize one with the other, and the declaration of section 4 is respected. The law of the state being appropriation, its grant of the land, made after the code enactment, carries with it no right to the water. For since such right can only be derived from some existing law, and the code has abrogated or repealed the law of riparian rights (except to the extent of preserving those then existing), there is no law under which the right to the water as part and portion of the title granted can arise.

As stated above, it is claimed by respondent that by the provisions of the Civil Code the doctrine of appropriation was adopted as the general law of the state, applicable to all public

lands of the state and the United States from the time section 1410 was enacted. But section 1410 is not limited in its application to the public lands. Subject to the saving or reservation clause of section 1422,—whatever that section may mean,—section 1410 declares the law applicable throughout the state.

It seems to be admitted that (conceding the rights of riparian proprietors to be measured by the common law) riparian rights already vested were not taken away by section 1410, and could not be taken away except for the public use and on due compensation. It must follow, independent of section 1422, ✓ that a purchaser from one who was a riparian owner when the code provisions took effect, by purchase made after the code enactments, would acquire all the estate and property of his vendor. Otherwise, private property would be taken without due process of law, since arbitrarily to deprive the owner of property of all capacity to sell it is to deprive him *pro tanto* of its benefits. "The right of acquiring, possessing, and protecting property is inalienable." "No man shall be deprived of his property without due process of law." (Const. 1849, art. 1, secs. 2-8; Const. 1879, art. 1, sec. 13.) The provisions of the constitution are intended effectually and completely to protect substantial rights, and cannot be frittered away by indirect legislation.

And as we have seen, one who since the acts of Congress of 1866 and 1870 receives a grant of a portion of the public lands of the United States, without special or implied reservation, takes subject only to appropriations of water made or initiated prior to his grant. Let us suppose, after the adoption of the code, but before any appropriation of the water flowing to the tract granted, a grant or patent for land to be issued by the United States. Could section 1410 be held to divest the grantee of his right in the flow of the stream? True, he has accepted his grant in the presence of the state statute. But the United States has undertaken to clothe him with the title to the land with the appropriate use of the water as part of the land. Would not a state law which, in advance of the grant, should attempt to take from the grantee the flow of the stream, acquired from or sought to be conveyed by the United

States, and confer the waters on one who has acquired no right to them from the United States, be an interference with the "primary disposal" of the public lands?

We do not find it necessary to say that the prospective provisions of the code would violate the obligation of a contract. But when the state is prohibited from interfering with the primary disposal of the public lands of the United States, there is included a prohibition of any attempt on the part of the state to preclude the United States from transferring to its grantees its full and complete title to the land granted, with all its incidents.

The same rule must apply to homesteaders, pre-emptioners, and other purchasers under the laws of the United States. To say that hereafter the purchaser from the United States shall not take any interest in the water flowing to, or in the trees on, or the mines beneath, the surface,—but others of our citizens shall have the privilege of removing all these things,—is to say that hereafter the United States shall not sell the water, wood, or ores.

It would seem, then, that the only persons who can find it necessary to resort to section 1422 of the Civil Code as the protection of their right to the flow of running waters are the state (as the owner of lands granted to it by the United States) and grantees from the state, unless it be where the adverse parties are merely occupants of land and water respectively on the public lands of the United States or of the state.

While the common law has been in force, not only has the right of eminent domain been in the state, but the state has been the direct owner of the swamp and overflowed as well as of other lands derived by grant from the general government. The state legislature has had power, not only to dispose of the lands and waters so held separately, as a private person may dispose of his own, but has had power to authorize the diversion of waters from such lands, either by private persons, the owners of lands above, or by private persons, on public lands of the United States lying above. From the date of such general authorization, a grantee of land from the state would take subject to appropriations of water actually made, and if the statutes were broad enough, and operated a reservation of

waters in favor of appropriations which might afterward be made, would take subject to subsequent appropriations.

But the statutes of the state cannot properly be construed as reserving from grants of state land the use of the waters flowing thereon, for the benefit of those who shall subsequently take or appropriate them either on or off the state lands.

The state has granted the waters running to its own lands, by authorizing the diversion of waters from its lands, and doubtless such grantees acquire the state property in the waters whenever the state has a property in the waters at the time of the grant. But can it be said that from the date of the code, the state reserved its waters in trust for those who should afterward appropriate them?

Our attention has been called to no provision of the laws providing for the disposition of the state lands which contemplates such reservation. And we see nothing in the law authorizing appropriations of water which can reasonably bear such interpretation. We must look for the definition of "riparian rights"—protected by section 1422—to the common law, which (when not in conflict with or repugnant to the constitution and state statutes) had been the law of the state for more than twenty years. The section which provides "the rights of riparian proprietors are not affected by the provisions of this title" declares, in effect, that those appropriating water under the previous sections shall not acquire the right to deprive of the flow of the stream those who shall have obtained from the state a title to or right of possession in riparian lands before proceedings leading to appropriation shall be taken. Such is the meaning of the words employed.

The right to the use of the waters as part of the land once vested in its private grantee, the state has no power to divest him of the right, except on due compensation. It is for those who claim that since the code enacts riparian rights have never vested in the state's grantees to point to the statute which expressly so declares, or which, by necessary implication, operates a reservation of all the waters on the state lands, for the benefit of subsequent appropriators. Such reservation can not be assumed, nor be based on any doubtful interpretation of language.

The use of the present tense—"the rights of riparian proprietors are not affected"—is not sufficient to justify a finding of a reservation by the state of all its waters.

It is difficult to believe that the section, so far as it applies to riparian lands and not those of the state, is other than declaratory of the pre-existing law. It certainly was intended to be declaratory in so far as it announces the protection of all private persons who had acquired riparian rights from any source before the provisions of the code went into operation, since (if the common-law right existed) such persons were protected independent of the section. We cannot presume that it was intended to limit the protection to those private persons who had then acquired riparian rights from the United States (but not through the state), or from Spain or Mexico, and to deprive the subsequent grantees of such of their riparian rights. The legislature had no power to deprive of their right to water the subsequent grantees or successors of those private persons in whom the right had vested prior to the code. The attempt would have been violative of constitutional principles. As the language of section 1422 will bear a reasonable interpretation which will render it applicable everywhere within the limits of the state, and to all classes of riparian proprietors (without impinging upon the vested interests of any), we ought not so to construe it as that, if enforced with respect to all, it would deprive any man of his constitutional right.

✓ Our conclusion on this branch of the case is, that section 1422 saves and protects the riparian rights of all those who, under the land laws of the state, shall have acquired from the state the right of possession to a tract of riparian land, prior to the initiation of proceedings to appropriate water in accordance with the provisions of the code.

If section 1422 of the Civil Code were interpreted as saving all riparian rights actually vested before the section took effect, the mere appropriator could acquire no rights to water by virtue of the provisions of the code, but would be left to the enjoyment of such as he might secure by convention with the riparian proprietors. If all riparian rights existing when the section was adopted were preserved by section 1422, then, inasmuch as both the state and the United States were at that

time riparian owners, the lands of neither government would be affected by the other sections relating to water rights; nor, of course, would any subsequent grantee of either government be affected by those provisions.

It is contended by counsel for appellants that the rights of the state to the flow of the waters on her lands were not affected by the code, for the further reason that the code provisions were intended merely to continue or supply a rule for deciding disputes "on the public lands of the United States."

But we think it was the manifest purpose of the legislature—derivable from title 8, as a whole, read in view of the judicial and legislative history of the state—that the rule should be the same whether applied to mere occupants of the lands of the state or of the United States; and that the riparian rights of the state, as owner of lands, were not preserved by section 1422.

As we have seen, by resort to the presumption of a grant or license from the owner of the paramount title, our courts from an early day have determined controversies between occupants of waters or of lands and waters,—on the public domain of the United States; holding the prior possessor to have the better right. And during its first session the state legislature provided a mode by which one might acquire a constructive or statutory possession of a portion of the unsurveyed, and as yet unsalable, public lands of the United States, to be accepted by the courts as proving a right to the possession against all but the government. (Act "prescribing the mode of maintaining and defending necessary actions on lands belonging to the United States." Stats. 1850, pp. 20–23.) The validity of such acts, so far as they affect mere intruders on the public land, or those entering thereon with the tacit consent of the government, has not heretofore been questioned. The right of the prior occupant of the land or water on the public domain of the United States being recognized by the courts, it cannot be doubted that the legislature had power to establish or change a rule of evidence according to which the prior occupation is to be proved. With reference to appropriations of waters on public lands, for example, the legislature had power to require that the notice of appropriation should contain certain statements, that work should be com-

menced within a definite time, and be completed within a named period, etc. Neither the state legislature nor the state courts have any independent power to interfere with the primary disposal of the public lands of the United States, nor to detract from the estates in such lands granted under the laws of the United States. Nevertheless, whilst a body of land and the waters thereon shall remain a portion of the public lands of the United States, the rights of mere possessors, or asserted possessors, thereon will continue to be determined, as between themselves, by the law applicable to such controversies as the same was laid down by our courts previous to the code enactments, except so far as it may have been modified by the provisions of the code. The legislation of the state (with reference to occupations on the public lands), like the judicial decisions, is based on the presumption that the general government has permitted the occupation of water, or of land with the water thereon, as the case may be. But this (so far as the operation of the state law is concerned) necessarily excludes the United States, although a riparian owner when the code was adopted, from the saving clause of section 1422.

The doctrine of presumption is enforced, however, not only on lands of the United States, but on lands of the state and of private persons. This has been the rule applied in every action of ejectment where the plaintiff has recovered on his prior possession. In such cases it has repeatedly been held that the defendant cannot be permitted to prove title in a third party unless he connects himself with it. The prior possessor is presumed to have acquired that title as against the mere intruder on his possession. In controversies upon the state lands the courts have not heretofore permitted the title of the state to be proved, by one not deraining from the state, for the purpose of destroying the asserted right of the prior possessor. Even where a court should be called on to take judicial notice of the state title, and that no law had been passed for the disposition of the state lands, it would, in the interest of peace and good order, presume, "contrary to the fact,"—as was said by Mr. Justice Heydenfeldt,—not only that the prior possessor had entered and occupied with the consent of the state, but that he had acquired the state title.

Prior to the adoption of the code there can be little doubt that in controversies between persons upon the lands of the state, as in like controversies upon lands of the United States (where neither of the parties had derived title from the government), the doctrine of priority of appropriation of water alone, or of water as a part of land appropriated, would prevail. These considerations create a very strong presumption that the riparian rights of the state as a landed proprietor existing when the sections of the code went into operation were not intended to be reserved by section 1422.

Inasmuch as the sections of the code relating to water rights (so far as they relate to appropriations of water on the public lands of the state or of the United States) are in furtherance and recognition of the previous doctrine of the courts of the state (according to which, as it would seem, the prior appropriator of land, and the water thereon, had the better right as against the subsequent appropriator of the water alone), it may be contended that section 1422 recognizes and reaffirms that part of the rule, and protects the riparian occupant on the public lands of the state from a subsequent appropriation of water on or above those lands. Either so (it may be argued) or section 1422 has no meaning or application when the controversy is between mere occupants on the public lands.

But however this might be, where both parties were mere possessors on public lands of the United States, the title 8 of the Civil Code, so far as it relates to waters flowing to the lands of the state, is more than an acknowledgment of the doctrine of prior appropriation on public lands. It is plainly a concession to those who may comply with its conditions, which operates as a grant of the servitude when the conditions are fully performed, relating back to the date of the commencement to perform. It is a concession, however, only of the rights to the water which the state shall not already have parted with when the appropriation shall be made.

XII. The statute of April 13, 1850, adopts the common law of England, not the civil law, nor the "ancient common law" of the civilians, nor the Mexican law.

In ascertaining the common law of England, we may and should examine and weigh the reasoning of the decisions, not

only of the English courts, but also of the courts of the United States and of the several states, down to the present time. We are not limited to the consideration of the English decisions rendered prior to July 4, 1776.

v The possessory rights of occupants of portions of the public lands, or of waters thereon (recognized by the California courts), are protected by the common law.

It must be assumed, as the cause is now presented, that the plaintiffs obtained from the state title to riparian lands prior to an appropriation of water flowing to those lands by the defendant; because, as we shall see, the court below erred in refusing to admit certain evidence bearing on that issue. Inasmuch, then, as the defendant here has acquired no right to the water by it appropriated—by reason of a reservation, express or implied, in the grant to the state or in the conveyances to the plaintiffs—which it can assert against the plaintiffs; and as there is no “public policy” arising out of physical conditions existing within our borders, or from the implied license to private persons to enter upon and occupy portions of the public lands, or the waters thereon, while they remain such, which compels or authorizes us to disregard the general law, or which should control or modify the meaning which should otherwise be attributed to the statutes of the United States,—it follows that the defendant has no right to divert the water from the lands of the plaintiffs unless that right exists under and by virtue of the common law, as the same was adopted in and by the act of April 13, 1850.

It is said by counsel for respondent that the common law adopted by the act of 1850 is the common law as the same was administered prior to July 4, 1776. *Throop v. Hatch*, 3 Abb. Pr. 23, is referred to as authority for this statement. But there the question was, what was presumed to be the law of another state, in the absence of averment and proof with respect to it. It was held there was no presumption that the statutes of another state were the same as those of New York. It is held in California that, in the absence of evidence on the subject, it would be presumed that the statutes of another state are the same as ours. . . .

A different question from the foregoing is the question whether, in adopting “the common law of England,” the

legislature adopted a law derivable from the usages and customs of miners and other occupants of public lands. It is alleged, in effect, that the last was a different law, with reference to waters, from the common law as enforced in England and other states of the Union. If this were true, it certainly was not adopted by the statute. The substitution of what is now called "appropriation" for the English rule would not be a mere modification of the common law; and strictly speaking, the common law is not modified by an application of its principles to new facts. It is quite certain that the alleged modification could not have been brought about by a general practice which could be upheld, upon the doctrine of license or grant, in accordance with the common law.

In entertaining, "against the fact," the presumption that the occupants of land or water on the public domain had received grants from the paramount sources of title, the courts of California did not repeal or modify the common law; but immediately after its adoption they began to follow the common law in that regard. The English courts had frequently held that a grant from the crown would be presumed from lapse of time. The courts here had held that lapse of time was only a reason for the presumption, and that upon common-law principles it might be sustained on other facts. Upon this common-law presumption is based the whole fabric of the law which determines conflicting possessory rights on the public domain. The presumption has no place where either party has received a grant from the government; for a presumptive grant (except perhaps when based on lapse of time) can never be asserted against an actual grant.

By the act of 1850, the common-law presumption was adopted as part of the common law; as was also the application of the presumption, as subsequently held by the courts, since its subsequent reasonable application was implicitly comprised in the presumption itself. Thus the principles of the common law fully protected the just possessory rights of occupants on the public lands. In adopting the common law, therefore, the legislature adopted the common law, and not some other and different law.

"The customs, usages, and regulations of the bar or diggings" were afterward, by express statute, declared to be admissible as evidence in "actions respecting mining claims." (Practice Act, 1861, sec. 621.) It has always been held that local regulations, etc., accepted by the miners of a particular district, are binding only as to possessory rights within the district, and that they must be proved as a fact. When they have been proved, the courts have considered them only for the purpose of ascertaining the extent and boundaries of the alleged possessions of the respective parties to a litigation, and the priority of possessory right as between them; or for the purpose of ascertaining whether the right of action has been lost or abandoned by failure to work and occupy in the manner prescribed. When the priority, limits, and continuation of a possession have thus been ascertained, the courts have proceeded to apply the presumption of grant from the paramount source, a presumption, we repeat, sustainable on common-law principles. It is also true (where no special "mining laws" have been proved) that, in ascertaining the limits of a mining possession, the courts have said the same common-law principles are to be relied upon as those which regulate rights to the possession of agricultural lands, although the *indicia* of possession are not necessarily the same. (*English v. Johnson*, 17 Cal. 107; S. C., 76 Am. Dec. 574.) The possession in such case may be proved by satisfactory evidence of notorious acts of occupation, reference being had to the nature of the lands, the uses to which they can be put, and to the general practices or customs of the region with respect to the occupation of lands of the particular character. But the possession, however proved, being established, the presumption of grant arises.

The act of 1850 adopts the common law of England, not the civil law; nor the *jus commune antiquum*, or Roman "law of nature" of some of the civil-law commentators (*Brady v. Reese*, 51 Cal. 447, note); nor the Mexican law; nor any hybrid system. And the expression "common law of England" designates the English common law as interpreted as well in the English courts as in the courts of such of the states of the Union as have adopted the English common law. We cannot presume that the members of the legislature, even at

that day, were utterly ignorant of the climate and soil of the country in which they lived; and there were included in their number many natives of California, who must be presumed to have represented the intelligence of a race which, for several generations, had been familiar with natural conditions here existing. The report of the proceedings of the legislature shows that there was a considerable minority in favor of the adoption of the civil law; and there are circumstances appearing from the proceedings tending to prove that the advantages of each system, as the fundamental law of the future, were discussed and fully considered. Under these circumstances, we must believe that if it had been intended to exclude the common law as to the riparian right, the intention would have been expressed. Moreover, it is a well-established principle, that when the legislature of this state has enacted a statute like one previously existing in other states, the courts here may look to the interpretation of such statute by the courts of the other states. (*People v. Webb*, 38 Cal. 477; *People v. Coleman*, 4 Cal. 50; S. C., 60 Am. Dec. 581; *Taylor v. Palmer*, 31 Cal. 254.)

Whatever the law pre-existing the statute of 1850, it was then and there done away with, except as it agreed with the common law. The matter was settled if the lawmakers had power to settle it.

And it was not the common law "as the same was administered" at a certain date that was adopted, but the common law. Indeed, the administration of the law in particular cases may be a very different thing from the law itself. (Note: We give counsel for respondent the benefit of the last suggestion, to be applied, if applicable, to the present decision.) The statute adopts the common law of England, except where inconsistent with the constitutions and statutes, and there can be no good reason why, to ascertain the common law of England, we should not refer to the decisions of English and American courts (in states where the common law prevails) rendered before and subsequent to the date of the statute.

Looking at the whole array of adjudications, if we find a question has often been decided in one way,—the cases preceding the line of corroborative and conformable decisions being adverted to in them, analyzed, and held not necessarily confic-

tive,—the rule of the common law involved or presented in the question ought to be considered as settled.

There is no pretense that the courts ever were infallible; it is sometimes held that a previous decision does not declare the law. Where the rule has become settled, it is not, as opposed to any former decision, a new rule, but must be held to have been the law from the beginning, because “right reason” has always been the prime element of the law. And in such case, if anything has been said in an earlier decision—which cannot be resolved into mere dictum, or as applicable to the peculiar facts—that apparently conflicts with the settled rule, it is considered to be an erroneous exposition of the law. Courts do not repeal former decisions; when they reverse them they hold they were never law.

The common law of England may be said to consist of a collection of principles found in the opinions of sages, or deduced from universal and immemorial usage, and receiving progressively the sanction of the courts. It was imported by our colonial ancestors, so far as it was applicable, and was sanctioned by royal charters. (1 Kent’s Com. 473.) The best evidence of the common law is found in the decisions of the courts, contained in numerous volumes of reports, and in the treatises and digests of learned men, “which have been multiplying from the earliest periods of English history down to the present time.” (Id.)

There is no implied exception in the words “so far as applicable” which would exclude the common law from the colonial law, except, perhaps, when the question was *ab ovo*, and no principle of the common law could have appropriate bearing upon it. Since the Revolution the common law of England has, of course, been inapplicable in the particulars that it does not harmonize with the political conditions on this continent. Where it is in conflict with our constitution of government, it is not part of our law, because the organic law is the supreme law. This would be the case if the statute were silent; and, as we have seen, the statute of 1850 does not adopt the common law so far as “it is repugnant to or inconsistent with the Constitution of the United States, or the constitution and laws (statutes) of the state of California.”

We know of no decisions which intimate that a difference in climatic or geographical conditions may operate to transfer a right of property from those in whom a right of property is vested by the common law. To so hold would be an attempt to do that which, as contended by counsel, could not be done with reference to the common use to which (as claimed) property was dedicated by the Mexican law. Such conditions may, perhaps, affect the mode of enjoyment of the common right of all the riparian proprietors on the same stream. Nor do we know of cases where the courts in the United States have undertaken to change the common law. We think it is abundantly proved by Mr. Houck that there has been no substantial change in the United States in the law with respect to navigable rivers (although the contrary has been asserted), but that the true test of navigability was always the fact of a river being in fact navigated or capable of being navigated; that all streams above tide are not in England innavigable. (Houck on Navigable Rivers, *passim*.) . . .

XIII. The doctrine of "appropriation," so called, is not the doctrine of the common law.

Counsel for respondent assert that the property in the use of waters is, by the common law, acquired only by appropriation.

Mason v. Hill, 5 Barn. & Adol. 1, was decided in the king's bench in 1833. The court there said: "The position that the first occupant of water for a beneficial purpose has a good title to it is perfectly true in this sense, that neither the owner of the land below can back the water, nor the owner of the land above divert it, to his prejudice. In this, as in other cases of real property, possession is a good title against a wrongdoer." He adds that the owner of a mill, if the stream is obstructed or diverted, may recover consequential damages to his mill (*Rutland v. Bowler*, Palmer, 290), and to the same effect are some American cases. "But," says Lord Denman, in *Mason v. Hill*, "it is a very different question whether he can take from the land below one of its natural advantages, which is capable of being applied to valuable purposes, and generally increases the fertility of the soil even when unapplied; and deprive him of it altogether by anticipating him in its appli-

cation to a useful purpose." . . . We think that this proposition has originated in a mistaken view of the principles laid down in the decided cases of *Bealy v. Shaw*; *Saunders v. Newman*; *Williams v. Morehead*, 2 Barn. & C. 915. It appears to us also that the doctrine of Blackstone and the dicta of learned judges in some of those cases, and in that of *Cox v. Matthews*, have been misconceived. . . .

It has been suggested that what is said on the subject in *Mason v. Hill* was mere dictum, since it is claimed that the case might have been decided on the theory of "appropriation." The case shows that the question was fairly presented, and was fully, and in one point of view necessarily, considered.

Mr. Angell, however, cites a case of as early a date as 32 Edward III, where an assize of nuisance was brought by A against B, for that B had made a trench from a river, and drawn away thereby a part of the water and stream another way from that in which it did formerly use to run; and the assize passed for the plaintiff; and it was adjudged that the water should be removed to its ancient channel at the cost of the defendant. . . .

In *Chasemon v. Richards*, 7 H. L. Cas. 384, Lord Winsleydale declares: "We may consider, therefore, that this proposition is *indisputable*, that the right of the proprietor to the enjoyment of a watercourse is a natural right, and is not acquired by occupation," etc.

In examining the numerous cases which establish that the doctrine of "appropriation" is not the doctrine of the common law, we meet an embarrassment of abundance. The authorities referred to under the next head, and many others, clearly hold to the contrary of the proposition contended for by counsel for respondent.

XIV. *Riparian rights.* By the common law the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy or suspend it. The right in each extends to the natural and usual flow of all the water, unless where the quantity has been diminished as a con-

sequence of the reasonable application of it by other riparian owners for purposes hereafter to be mentioned.

In the case now here there is no question as to the use of water for propelling machinery. And in treating of the riparian right at common law, we shall reserve (for the present) the consideration of the effect of the diminution of the flow of a stream, by reason of its consumption by a riparian proprietor, to satisfy what has been called "natural wants,"—its reasonable consumption by cattle or for domestic uses,—and also the effect of absorption and evaporation by reason of its application to the purposes of irrigation.

As to the nature of the right of the riparian owner in the water, by all modern as well as ancient authorities the right in the water is usufructuary, and consists not so much in the fluid itself as in its uses, including the benefits derived from its momentum or impetus. (Angell on Watercourses, sec. 94, and notes.)

But the right to a watercourse begins *ex jure naturae*, and having taken a certain course naturally, it cannot be diverted to the deprivation of the rights of the riparian owners below. So say all the common-law text-books and the decisions. . . .

It has always been held that a grant of land carries with it the water flowing over the soil. The well-known maxim, "*Cujus est solum, ejus est usque ad coelum*," inculcates that land, in its legal signification, has an indefinite extent upward.

We need not add that rights to the use of water may be acquired by grant, under some circumstances by assent, and by adverse user and possession.

It is unnecessary to pursue the subject further, or to refer to the many text-books and decisions of the courts in England, and in other states, which fully support the proposition laid down in the foregoing title. (No. XIV.) . . .

XV. By our law the riparian proprietors are entitled to a reasonable use of the waters of the stream for the purpose of irrigation. What is such reasonable use is a question of fact, and depends upon the circumstances appearing in each particular case. . . .

Judgment and order reversed, and cause remanded for a new trial.

Mode of Appropriation—Right of Way—Effect of Posting Notice.

ELENA P. de WOLFSKILL, Appellant, v. GEO. A. SMITH and DATUS E. MYERS, Respondents.

(5 Cal. App. 175, 89 Pac. 1001.)

SHAW, J.—Appeal from judgment in favor of defendants. This action involves the right to water flowing from artesian wells located upon government land.

It is based upon the following facts: Some time during the year 1900 an oil company commenced boring for oil in a canyon in the southeast quarter of the northwest quarter of section 4, township 3 south, range 2 west, S. B. M. It continued the prosecution of its work until January, 1901, when, after having bored three wells and found no oil or other mineral substance, it abandoned work. At the time of the commencement of said work, and up to October 20, 1902, the said land was unsurveyed land of the government, and, except as to the time that said oil company was prosecuting said work, was unoccupied. The three wells bored are in line with the bed of the canyon, distant about five hundred feet apart. The lower well has since its completion by said oil company flowed five inches of water, measured under a four-inch pressure; the second or middle well, three inches under like measurement; and from the upper well no water flows at all. On the ninth day of October, 1902, and after the oil company had abandoned all work upon the premises upon which said wells were located, it executed to the plaintiff a deed whereby, for a valuable consideration, it purported to convey to said plaintiff all its right, title and interest in and to said forty acres of land and said wells and the water therein and flowing therefrom. That thereafter, on October 13, 1902, plaintiff posted in a conspicuous place at each of said wells a notice of appropriation, as follows:

“NOTICE OF APPROPRIATION OF WATER.

“Take notice that the undersigned claims fifteen hundred inches of water measured under a four-inch pressure flowing

from and at the wells bored by the San Jacinto Oil Company on the land which would be the northwest quarter of section four, township three south, range two west, San Bernardino meridian, if said land were surveyed by the United States, and I intend to divert said water at the three several points where this notice is posted, to wit, at each of said wells bored by the San Jacinto Oil Company.

"I intend to use said water for domestic and irrigation purposes on the land which was known as the Rancho San Jacinto Nuevo and the Morena, Lakeview and Alesandro Colonies and adjoining lands in the county of Riverside, state of California.

"I intend to divert said water by means of ditches of sufficient capacity to carry same, leading from each of said points.

"Dated the thirteenth day of October, 1902.

"ELENA P. de WOLFSKILL.

"Witness:

"DAVID G. WOLFSKILL."

That on October 16th following one copy of the above notice was filed for record in the office of the county recorder of Riverside county, but that neither of said notices or copy filed was ever acknowledged.

That on October 20, 1902, one of the defendants, George A. Smith, entered upon and took possession of the entire northwest quarter of said section as a homestead under the laws of the United States, and since said date Smith has been in possession of said premises and of the wells located thereon and the water flowing therefrom, and has fully complied with the provisions of the law relating to the acquisition of government land by settlers thereon for homesteads.

That on August 21, 1902, Datus E. Myers did, under and in accordance with a certain act of Congress, file in the proper United States land office certain documents, data and maps required by said act of Congress, whereby he located a right of way for a pipe-line one hundred feet in width and extending across and through said forty acres upon which said wells were located, and embracing within its boundary lines the land upon which all of said wells are located. That thereafter, on November 17, 1902, said Myers, under the act of Congress en-

titled, "An act for the relief of Thomas B. Valentine," selected said southeast quarter of said northwest quarter, and being the forty acres upon which said wells were located, and duly filed certificate of location "E. No. 20" for forty acres of land issued in accordance with said act, and said selection was allowed.

That plaintiff duly commenced the construction of the ditch required to convey the water sought to be appropriated to her land and prosecuted the work continuously until, at the instance of defendant Smith, she was enjoined from entering or working upon the northwest quarter of said section on which he had, on October 20, 1902, located his homestead.

That said defendant Smith capped the wells, fenced the land in and prevented plaintiff from doing any work on said premises, or taking or diverting any water therefrom, and claims the right so to do by virtue of this claim and occupancy of said premises as a homestead.

No issue as between defendants is involved, the sole question being the right of plaintiff as against both defendants. From a judgment in favor of defendants the plaintiff appeals.

Appellant bases her claim to the water, first, upon the deed of conveyance from the oil company; second, upon the notice of appropriation, duly followed (so far as not prevented by the acts of defendant Smith) by the statutory steps required for the actual appropriation of water subject to appropriation under the laws of this state. As against plaintiff, the defendant Myers claims the water by virtue, first, that the wells are located within the boundary lines of the right of way for the pipe-lines which he located on August 21, 1902, which location was prior in date to either the alleged posting of notice of appropriation or purchase made by plaintiff; second, that his selection of the forty acres of land under the Valentine scrip entitled him to the flow of the wells as against plaintiff.

Smith's claim is by virtue of his being an actual occupant of the land under the homestead laws of the United States.

Plaintiff's claim to the wells or the water flowing therefrom, so far as such claim is based upon purchase and conveyance from the oil company, which had bored the wells, cannot be sustained. The fact that these flowing wells resulted from a fruitless effort to discover oil gave the company no right, title

or interest in the land or stream of water flowing thereon. The laws governing the location of placer claims apply with equal force to the location of oil claims. (*Miller v. Chrisman*, 140 Cal. 441, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444.) The oil company had acquired no right, title, or interest in the land or water which it could legally convey. No attempt has been made to comply with the laws applicable to the location of an oil claim. Its rights, if it had any, to the land, wells, or water flowing therefrom, terminated when it ceased work thereon and abandoned its efforts to discover oil. Admitting that actual occupation of the land accompanied by active work thereon, in the prosecution of its efforts to discover oil, entitled the company to possession, such right terminated upon a failure to discover oil, and when, prior to October 9th, it abandoned the enterprise.

Where a miner abandons his claim, it reverts to its original status as a part of the unoccupied public domain. A subsequent locator takes it with all shafts, tunnels and drifts, however extensive or costly. (20 Ency. of Law, p. 733.)

The same principle applies to an oil claim, and it follows that inasmuch as the San Jacinto Oil Company had, prior to October 9, 1902, abandoned the premises upon which the wells, one flowing five inches and one flowing three inches, were located, the land reverted to its original status as a part of the public domain. It was, in October 13, 1902, the date of posting the notice of appropriation of the water, a part of the unoccupied government land. Was this water subject to appropriation? In our opinion it was. The law is well settled that water flowing from springs upon the public lands of the United States is subject to appropriation under section 1410 of the Civil Code, which provides that "The right to the use of running water flowing in a river or stream, or down a canyon or ravine, may be acquired by appropriation."

The fact that the flow of the stream from the spring is caused by water percolating through the soil does not deprive it of the character which makes it subject to appropriation. "Where percolating waters collect or are gathered in a stream running in a defined channel, no distinction exists between waters so running under the surface or upon the surface of land." (*Cross v. Kitts*, 69 Cal. 217, 58 Am. Rep. 558, 10

Pac. 409.) Water passing through the soil, not in a stream but by way of filtration, is not distinctive from the soil itself; the water forms one of its component parts. In this condition it is not the subject of appropriation. When, however, it gathers in sufficient volume, whether by percolation or otherwise, to form a running stream, it no longer partakes of the nature of the soil, but has become separate and distinct therefrom and constitutes a stream of flowing water subject to appropriation. The water in question here is the stream issuing from the wells, and it is immaterial for the purposes of this discussion whether this stream is supplied by water percolating and filtering through the earth or not; at all events, it has gathered into a stream. No distinction can be made between the water flowing from these artesian wells and that flowing from the springs. "Water rising to the surface of the earth from below and either flowing away in the form of a small stream or standing as a pool or small lake," is the definition of a spring given by the Century Dictionary. This definition is equally applicable to an artesian well. The stream, in either case, may result from the gathering of water at some point, whether near or distant, which produces the stream, the flow of which is by natural causes forced to the surface. In the one case the aperture or opening through which it finds its way to the surface is the result of nature's forces; in the other, it is produced by artificial means; the fact that it is produced by boring a hole in the ground in no wise changes its character. In either case the water flows to the surface naturally. When a stream of unappropriated water flows from an artesian well, having its location upon unoccupied government land, it is the subject of appropriation to the same extent as the waters of a natural spring likewise located.

Posting the notice of claim to the water does not constitute an appropriation. The Civil Code, section 1416, provides that within sixty days the claimant must commence the construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly. And section 1418, Civil Code, provides that by a compliance with the rules contained in section 1416, the claimant's right to the use of the water relates back to the time the notice was posted. His right to the water depends upon his complying with the

provisions of the law and making an actual appropriation of its use. The court finds that the claimant did commence work within sixty days after posting the notice and prosecuted it continuously until enjoined therefrom at the instance of defendant Smith on December 10, 1902, after Smith had settled upon the land, and that Smith fenced the land and prevented her from constructing the ditch. Having capped the wells and enjoined appellant from entering upon the land to complete the ditch, by means of which she sought to divert the water to the place of intended use, respondents are in no position to assert that appellant has failed to prosecute the work with diligence and become an actual appropriator.

By act of Congress passed July 16, 1866 (14 Stats. at Large, 253), it is provided: "That whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing, or other useful purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same, *and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed.*" (U. S. Rev. Stats., sec. 2339; U. S. Comp. Stats. 1901, p. 1437.)

Later this act was amended by a provision to the effect that all homesteads allowed should be subject to vested and accrued water rights and rights to ditches used in connection therewith.

By posting the notice appellant from that time became vested with the right to the use of the stream of water then flowing from these wells, together with the right to construct over and across the land the necessary ditches to divert and conduct the same to the place of intended use. Both Myers and Smith took the property subject to the rights of appellant to the stream of water then flowing thereon, together with the right, without interference, to construct the necessary ditches for its diversion, which rights accrued and became vested in her under the said acts of Congress and the laws and decisions of this state. The language used in *Taylor v. Abbott*, 103 Cal. 421, 37 Pac. 408, where it is said that the above-quoted section "does not confer the right to enter upon the lands in the

possession of another for the purpose of securing the water therein, or of completing an attempted diversion of water," is not applicable to this case, for the reason that in that case no sufficient notice had been posted, and therefore no right to the water had accrued or become vested under the local laws and decisions of the courts.

The notice was posted in a conspicuous place at each well and the claim is for fifteen hundred inches of water "flowing from and at the wells." It appears that these wells are in line with the bed of the canyon, and the lower one about five hundred feet distant from the one next above, or middle one, and that no water flows from the upper one. Under these facts we regard the notice as a sufficient designation of the point of diversion, as well as sufficient in substance to meet the requirements of section 1415, Civil Code. Nor was it necessary, the notices being identically the same, to record more than one copy. The purpose of recording is to furnish notice of claimant's rights to subsequent settlers upon the land or appropriators of the water, and this object was fully attained by recording one copy.

The northerly or upper well supplied no stream of running water, and hence affords no water subject to appropriation. Nor do the facts entitle appellant to enter the land for the purpose of developing water by boring additional wells, but she has an accrued and vested right to prosecute her work under and in accordance with the provisions of section 1416 of the Civil Code in the construction of the necessary ditches to convey the stream of water flowing from the two southerly wells to the place of intended use, and do all things necessary to complete the actual appropriation of the stream of water, in accordance with the notice posted on October 13, 1902.

The judgment is reversed, and the trial court will render a judgment for appellant in accordance with the views herein expressed.

Completed Actual Appropriation—Subsequent Appropriation Under Code.

J. M. WELLS, Respondent, v. JOHN MANTES et al., Appellants.

(99 Cal. 583, 34 Pac. 324.)

GAROUTTE, J.—This is action to restrain appellants from diverting the waters of a certain stream, and thereby depriving plaintiff of the use thereof. The plaintiff, by actual diversion, appropriated two thousand five hundred inches of the water of the stream for the purpose of irrigation. Subsequently, defendants, at a point a mile or more above plaintiff's place of diversion, posted notices in accordance with the provisions of the Civil Code, and proceeded to claim and appropriate the waters of the said stream regardless of any rights of plaintiff to such waters obtained by virtue of his actual appropriation. The only question presented by this record is: Can a person, by the actual diversion and appropriation of water, obtain the right to the use thereof as against a claimant who subsequently posts his notices upon a stream, in accordance with section 1415 of the Civil Code, and proceeds thereafter, as required by the statute, to perfect his rights? We have no doubt but that an actual and complete appropriation of the waters of a running stream may be made without following the course laid down in the Civil Code. In *De Necochea v. Curtis*, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198, which was subsequently followed in *Burrows v. Burrows*, 82 Cal. 564, 23 Pac. 146, it was decided that such an actual appropriation was good as against a subsequent pre-emptioner of the land upon which the spring was situated, from which the appropriated water flowed. Such was declared to be the law by virtue of the Amendatory Act of Congress of July 9, 1870, which, among other things, provided that "all patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested or accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory."

It was held that, by virtue of the act of Congress quoted, defendant took his title from the government with a servitude resting upon the land. The spring from which the stream flowed was situated upon the land pre-empted, and therefore was the property of the defendant Curtis. And in contesting De Necochea's right to the use of the water running from the spring, the pre-emptioner in no sense could be classed as a mere trespasser seeking to interfere with the rights of the party enjoying the actual possession of the water. He occupied a position much stronger than a mere subsequent appropriator, for as to such a one it is apparent at a glance he would have had no rights whatever. In order to defeat the defendant's claims in that litigation it was necessary to hold that the prior appropriator had a right to the use of the waters of the stream, by virtue of his actual appropriation and possession, beyond that which was sufficient to defeat a mere intruder, for that term in no sense could be applied to the pre-emptioner Curtis. If a right to the use of the water of the stream, merely sufficient to defend against a trespasser, would not have been sufficient to defeat the pre-emptioner, it follows necessarily that the pre-emptioner, being defeated in that case, the prior appropriator was recognized as possessing vested rights to the use of the water by actual diversion and without complying with the provisions of the code. It is substantially held in that case that, when the pre-emptioner took his title, he took it with a servitude upon the land; and this servitude was not created by complying with the statute as to the appropriation of water, but by an actual diversion alone. For these reasons we deem that case directly in point upon the question at bar.

As supporting the determination that a vested right to the use of water may be secured without invoking the provisions of the code, it must be remembered that the congressional legislation quoted was enacted, as is said in *Broder v. Water Co.*, 101 U. S. 276, 25 L. ed. 790, for the purpose of recognizing pre-existing rights to the use of water, rather than establishing new rights.

Again, we cannot bring ourselves to think that a mere subsequent appropriator under the code occupies a better position than the pre-emptioner whose situation we have just been

discussing, and whose rights to the waters of the stream we have held to be secondary to those of the prior appropriator. To say that the pre-emptioner has no rights against the prior appropriator, but that the subsequent appropriator by posting notices, etc., has a superior right to the prior appropriator, is inconsistent in the extreme. Such a practice would result in an unjust discrimination, and has no sound support in the law. If the prior appropriator has sufficient rights in the water to defeat the pre-emptioner, and we have decided such to be the case, he has sufficient right to defeat the subsequent appropriator under the code.

Section 1418 of the Civil Code reads: "By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted"; and we think the scope and purpose of all the provisions of the chapter upon water rights was to establish a procedure for the claimants of the right to the use of water, whereby a certain definite time might be established as the date at which their title should accrue. In this connection we quote again from *De Necochea v. Curtis, supra*, wherein the court, speaking of this question, said: "In this provision we begin to see the purpose and object of the legislature which, in our opinion, was merely to define with precision the conditions upon which the appropriator of water could have the advantage of the familiar doctrine of relation upon which it had always been held before the statute, that one who gave sufficient notice of his intention to appropriate, and followed up his notice by diligent prosecution of the work, was upon its completion to be deemed an appropriator from the date of his notice, and was, therefore, prior in time and stronger in right than an intervening appropriator, notwithstanding his diversion of the water might be first completed." No possible injury can result from this construction of the statute. A party contemplating an appropriation of water from a stream is furnished with more definite information for his guidance as to the character and extent of the appropriation by an actual diversion than could possibly be obtained from the notices provided by the statute.

To defeat the respondent's rights, appellants invoke section 1419 of the Civil Code, which reads: "A failure to comply

with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith." We think this provision does not refer to an appropriator by actual diversion, but only to claimants seeking the right to the use of water under the provisions of this chapter of the code. This is made apparent by an examination of the preceding sections. Section 1415 provides: "A person desiring to appropriate water must post a notice in writing, in a conspicuous place at the point of intended diversion, stating therein that he claims the water there flowing to the extent," etc. Section 1416 reads: "Within sixty days after the notice is posted the claimant must commence the excavation or construction of the works," etc. Section 1418 reads: "By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted." It thus becomes apparent from these provisions that the word "claimants," as used in section 1419, refers to a party posting and recording notices required by the provisions of section 1415, and does not apply to an appropriator by actual diversion.

For the foregoing reasons, it is ordered that the judgment and order be affirmed.

Subsequent Appropriator Entitled to Surplus—No Distinction Between Uses.

ORTMAN et al. v. DIXON et al.

(13 Cal. 33.)

BALDWIN, J., delivered the opinion of the court—
TERRY, C. J., concurring.

Bill filed for an injunction against the defendants, to restrain them from turning the waters of a stream, called Mill creek, into a ditch constructed by them, known as Ditch No. 3, as marked on the map accompanying the pleadings.

Two main questions arise on the record: 1. Can a water right be conveyed by a bill of sale not under seal? And 2. Has the prior locator of a water privilege the right to change

the point of diversion from the main stream under the facts hereafter stated?

First. We do not consider that it is at all necessary to hold that a water right, so as to pass the *legal* title from grantor to grantee (the premises being in adverse possession), must be conveyed by deed; for here the right of the water was appurtenant to, or connected with, a ditch. Any executed contract which passed the equitable right to the ditch, and the use of the water as the property of the grantee, is enough to assure to him the rights for which he stipulated as against an adverse claimant. Possession itself would be enough, and surely that possession is no worse for being associated with an equitable right. The difference between instruments sealed and unsealed is at least, at this day, a mere arbitrary and unmeaning distinction made by technical law, unsustained by reason; and, though the courts may have no right to abrogate what the law has established, even when the rule be senseless, yet we will not go out of our way to give effect to such distinctions, when the law does not clearly so require. But this distinction between sealed and unsealed papers has no force, as a general rule, except in a particular class of cases to which this does not belong. Where an instrument touching title to the realty is not under seal, the strict legal title, at common law, was not conveyed; but the equitable title might be conveyed by an instrument not sealed, if otherwise sufficient; and this equitable title, if accompanied by possession, is sufficient, under our system, to give a right of possession. Indeed, we do not see, under our system of practice, which recognizes none of the old forms of action, but which was designed to afford a plain, unembarrassed remedy upon the particular facts of each case, why an action cannot be maintained upon any title, legal or equitable; or upon an instrument, sealed or unsealed, which entitled the plaintiff to the possession of the property in dispute as against the defendant. But this is a proceeding in equity, and in that form an equitable title is as good as a legal title, as a matter for defense or recovery.

Second. The second question is of more difficulty; it involves the necessity of an examination of the particular facts in connection with which it is made. In the fall of 1851, the first ditch was constructed, designated on the map filed as

Ditch No. 1, for the purpose of conveying the water flowing in Mill creek to Atchinson's bar. Ortman first commenced the building of the ditch, and constructed it only a few rods. It was afterward extended by the miners in that locality to the claims on Atchinson's bar. It appears, when first located, to have been used as common property. No charge was ever made for the waters it conveyed, and the miners indiscriminately repaired the ditch and took the water as they required it to wash their dirt. It was not reputed or known to be the exclusive property of any particular person, though, from the testimony, Ortman was the first to commence its excavation. Ortman and all others have long since abandoned the use of the first ditch.

In January, 1852, the defendants took up the waters of the creek for milling purposes, and erected a sawmill, which they have owned ever since, and used the same from time to time. In 1853, Louis Duhamel, with two others, commenced the construction of a *second ditch*, marked Ditch No. 2 on the map, at a point above defendants' mill-pond, and higher up the stream, by means of which they diverted water of the creek to the same mining claims as the first ditch did. Duhamel & Co. used the water which their ditch afforded at such times as the defendants were not engaged in running their mill, but desisted, whenever the defendants had use for the water. The evidence shows that Duhamel & Co. recognized and acquiesced in the prior rights of defendants to the water of this creek. Some time in the year 1853, Duhamel & Co. sold the ditch to the plaintiffs, by which they acquired all the rights and privileges possessed by Duhamel & Co., and have since that time used the water for mining. The defendants, in the fall of 1856, constructed a third ditch, still higher up the stream, and above the last-mentioned Ditch No. 2 of the plaintiff, through which they diverted all the water ordinarily flowing in the creek, and conveyed it to near the same mining claims as the other two ditches, which water they disposed of to the miners.

We presume that it is not to be doubted that the defendants, having first appropriated the water for their mill purposes, are entitled to it to the extent appropriated, and for those purposes to the exclusion of any subsequent appropriation of it for the same or any other use. We hold the absolute

property in such cases to pass by appropriation as it would pass by grant.

But another and different question arises, and that is, To what extent does this power or right go? The measure of the right, as to extent, follows the nature of the appropriation, or the uses for which it is taken. The intent to take and appropriate, and the outward act, go together. If we concede that a man has right by mere priority to take as much water from a running stream as he chooses, to be applied to such purposes as he pleases, the question still arises, What did he choose to take? And this depends upon the general and particular uses he makes of it. If, for instance, a man takes up water to irrigate his meadow at certain seasons, the act of appropriation, the means used to carry out the purpose, and the use made of the water, would qualify his right of appropriation to a taking for a specific purpose, and limit the quantity to that purpose, or to so much as necessary for it. So, if A erects a mill on a running stream, this shows an appropriation of the water for the mill; but, if he suffers a portion of the water, or the body of it, after running the mill, to go on down its accustomed course, we do not see why persons below may not as well appropriate this residuum as he could appropriate the first use. The truth is, he only appropriates so much as he needs for the given purpose. It may be true, as the counsel has ingeniously argued, that he may change the use, and even the place of using; but this concession does not help the argument, for the question is not how he may use his own, but what is his own.

The principle is not materially different when applied to the fact that the ditch of defendant was built above plaintiff's mill, and the water diverted so as to be carried out of the old channel or course; for, upon the ground suggested, plaintiff was only entitled to the water for the purposes of the mill. ✓ He was entitled to all, whenever all was necessary for the mill; but whenever the mill did not need or could not use it for its operations, the defendant could use it for his purposes. It is not a question of priority, as to two classes of appropriators; for we cannot draw any distinction between the mill owner and the miner. But it is a question between claimants of the same article—each claiming a part. There is no real conflict

of title—the latter only claiming what is left by the former, and what the former has not taken. The mistake of the argument of appellant's counsel is in assuming that the mill owner had appropriated all of this water, and, therefore, could use all for any other purpose. But the finding is, and we assume the proof, too, that he only appropriated so much as was needed for running his mill. It is as if the paramount proprietor had made him a grant of so much water as was so needed. When the respondent's predecessor located his ditch, this was the beginning of his right. The appellant could not impair this right.

It might be argued with great force that the mill owner was not entitled by erecting the mill and dam to the water *in specie* and as a commodity to be taken out and sold; that he is only entitled to its use as a motive power; that it would lead to injurious consequences to hold that a man erecting a mill and dam on a large stream of running water could use it as long as he chose and then divert it from ditches below; that the right to water comes from the appropriation, and that appropriation is taking with the intent to apply to the uses of the person taking; and there may be as well an appropriation of a limited quantity, or for a limited purpose—an appropriation of a mere use as an appropriation of the water as property for sale. But it is not necessary to go to this length for any purpose of this decision. It is enough to hold that this appropriation, according to the finding of facts, was not an appropriation of all this water as the property of the appellant; but only an appropriation of so much as necessary for the mill; and that the appellant, after the claim to this residuum had attached by the plaintiff's appropriation, could not enlarge his right at the expense of the respondent's rights already vested.

We take the facts as they are found by the court below. It is admitted by the counsel that the proofs are conflicting, and we do not usually interfere in such instances.

Judgment affirmed.

Adverse Possession—Appropriator Also Riparian Proprietor.LOW v. SCHAFFER et al. *this*

(24 Or. 239, 33 Pac. 678.)

Suit by Leonard Low against Logan Schaffer and Amanda L. Schaffer to enjoin defendants from diverting the water of a certain creek. Decree for defendants, and plaintiff appeals. Reversed.

The other facts fully appear in the following statement by MOORE, J.:

This is a suit to enjoin the defendants from diverting the waters of Hill creek, in Baker county, Oregon. It appears that the waters of the creek flow through defendants' land, and thence in a northeasterly direction through the plaintiff's adjoining land; that about one-half of the volume of these waters is supplied from springs on defendants' land; that about 1866 plaintiff settled upon a tract of government land, and, after it had been surveyed and platted, he obtained the United States patent therefor; that at the time of his settlement he dug three ditches from said creek, and diverted and used all the water thereof to irrigate his arid land, and has ever since continued to so use it, except when diverted by others; that about 1876 one Martin Hill settled upon a tract south of and adjoining the plaintiff's said land, built a house and some fencing thereon, dug ditches from said creek, and diverted and used the water to irrigate the cultivated portion of it, and continued to use the water for that purpose until about 1880, when he transferred his possessory right and improvements upon said land to plaintiff, who continued to irrigate it by the water of said creek until about 1884, when, by a bill of sale, he transferred the possessory right and improvements on said land acquired from Hill to one Thomas Huffman; that Huffman went into possession of said premises, diverted and used the water of said creek, and irrigated the land therewith until about 1885, when one Oscar Hindman contested his right thereto before the local land officers, and as a result of the contest secured the land, and obtained a patent from the United States therefor; that Hindman diverted and

used the waters of said creek, and also diverted and used the water from three springs on said tract, which were tributaries of said creek, to irrigate his land, and in May, 1890, and after he had made final proof in support of his claim, he conveyed it to the defendants, who went into possession, and have since that time diverted and used the water appropriated by Hindman to irrigate their lands; that the lands of both plaintiff and defendants are dry and arid, and without water are nearly valueless, but by irrigation are made to produce excellent crops; that another stream, known as "Alder creek," flows through plaintiff's land, and serves to irrigate the whole tract except about ten to fifteen acres, which has been irrigated from the water of Hill creek. The plaintiff alleges a prior appropriation of the water of Hill creek; that he is a riparian proprietor on said stream; and that the water thereof is necessary for his use. The defendants, after denying the allegations of the complaint, for a separate defense allege an adverse user of the water of said creek by themselves and their grantors and predecessors since 1876; and for a further separate defense allege that plaintiff was one of their grantors and predecessors in interest, and that such water was not necessary for his use, but that he desired it for speculation. The reply denied the allegations of new matter in the answer, and, the issues having been completed, the testimony was taken by a referee, and the court found that the equities were with the defendants, and decreed to them twenty inches of the water of said creek, from which decree the plaintiff appeals.

D. D. Williams, for Appellant.

H. E. Courtney, for Respondents.

MOORE, J. (after stating the facts).—The evidence conclusively shows that plaintiff was the prior appropriator of the water of said creek, and that he had diverted and used it for more than ten years prior to Hill's diversion; and, as a consequence, he is entitled to the use thereof, unless he has lost it by an adverse user or by abandonment. To constitute an adverse user of more than ten years the defendants must necessarily tack the use of Huffman to that of Hindman, their grantor. Continuity of use is an essential element of an ad-

verse title. When several persons enter upon land in succession, the several possessions cannot be tacked so as to make a continuity of possession, unless there is a privity of estate or the several titles are connected. Whenever one quits the possession, the seisin of the true owner is restored, and an entry afterward by another, wrongfully, constitutes a new disseisin. . . . If there has been any break or interruption in the use, the several uses cannot be tacked so as to make it continuous. If Hill's use in 1876 had been adverse to plaintiff's claim, when in 1880 he transferred his possessory right and improvements to the plaintiff he thereby restored plaintiff to his original claim. Admitting that plaintiff transferred his possessory right to Huffman more than ten years prior to the commencement of the suit, Hindman could not tack his possession to that of Huffman, since there was no privity of interest or of estate between them; and Hindman did not take the title from Huffman as a tenant, heir, or vendee, but by an independent title from the government, and hence the defense of adverse possession must fail.

A prior appropriator of the water of a stream, who has a possessory right to the real estate benefited thereby, may, by a parol transfer, assign his interest in the land as well as his right to the use of water appurtenant thereto. The water appropriated for irrigation is as much a part of the improvements as his buildings and fences, and the transfer of the possessory right to the land carries with it the water so appropriated, unless expressly reserved. (*Hindman v. Rizor*, 21 Or. 113, 27 Pac. 13.) The verbal sale and transfer of his water right by a prior appropriator operates *ipso facto* as an abandonment thereof (*Smith v. O'Hara*, 43 Cal. 371), and he could not thereafter reassert his original right to the same against another appropriator. (Pom. Rip. Rights, sec. 88.) The plaintiff could not be deprived of his use unless there was a manifest intention upon his part to abandon it, and this intention must be determined from his declaration and acts in relation thereto. (*Dodge v. Marden*, 7 Or. 460.) It appears that Hill had diverted and used the water from Hill creek to irrigate his crops, and that plaintiff, while he claimed the possessory right thereto, had also used the water for that purpose. It appears that the bill of sale evidencing

the transfer of the possessory right from plaintiff to Huffman was left with Huffman's attorney, and was not offered in evidence. While plaintiff occupied and cultivated the land now owned by the defendants, he never used the water from Hill creek to irrigate the crops growing thereon, except in the early season, when there was an abundance of water in the creek; thus showing that he considered and treated this tract as a servient estate to his own lying below, and that Huffman, while he occupied it, never used water thereon except by the plaintiff's permission, and then only when it was abundant. The plaintiff testifies that he never sold or assigned to Huffman the right to use any water from the creek, and in this he is corroborated by the testimony of Huffman, who swears that he never purchased any of the water rights thereon, or used any water except by plaintiff's permission. This evidence rebuts the presumption that plaintiff abandoned the use of the water. There could be no such abandonment without an intention on plaintiff's part to that effect, and his intent is to be gathered from his acts. (*Mallett v. Uncle Sam etc. Min. Co.*, 1 Nev. 188, 90 Am. Dec. 484.) . . .

The law regards the appropriation which is first in time to be prior in right, and that such appropriation constitutes a vested right, which the courts will protect and enforce. When the waters of a stream have been appropriated for a beneficial use, it is an appropriation of all the tributaries thereof above the point of original diversion. (*Malad etc. Irr. Co. v. Campbell*, 2 Idaho, 411, 18 Pac. 52.) If the water from tributaries could be diverted it would destroy or impair the original appropriation. (*Strickler v. City of Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313; *Strait v. Brown*, 16 Nev. 317, 40 Am. Rep. 497.) The testimony of the plaintiff and his witnesses shows that the springs upon defendants' lands discharged their waters into Hill creek by well-defined natural channels, while the defendants and their witnesses testify that there are no natural channels therefrom, but that the water percolates through the soil, and ultimately reaches the creek. The referee and court, however, have found that these springs are tributaries to said creek, and flow in well-defined channels, and that the diversion of

the waters of said springs deprives plaintiff of the use thereof, to which he is entitled by reason of his prior appropriation.

The defendants claim that when they bought their land the water was being diverted from the creek and springs and flowing in the ditches upon the land, and in use for purposes of irrigation, by their grantor. The evidence shows that before they purchased the property they examined it, and would not have bought it but for the water rights supposed to be appurtenant to it. The record also shows that they accepted a quitclaim deed from their grantor; that the plaintiff's ditches were constructed on their land, and were diverting water from the creek; and hence it cannot be said that they were innocent purchasers for a valuable consideration without knowledge or notice (*Baker v. Woodward*, 12 Or. 3, 6 Pac. 173), and defendants must therefore be presumed to have purchased with knowledge of plaintiff's rights in the premises. (*Coffman v. Robbins*, 8 Or. 278.)

Plaintiff contends that because he is a riparian proprietor of Hill creek, and made a prior appropriation of its waters, he is thereby entitled to the flow of water in the stream in excess of his appropriation; that as a prior appropriator he can divert the quantity necessary for his use, and then claim the right as a riparian proprietor to have the surplus water flow in the channel, notwithstanding the fact that defendants are riparian proprietors above him. Each riparian proprietor has the right to the ordinary use of the water flowing past his land for the purpose of supplying his natural wants, even if it take all the water of the stream to supply them. He also has the right to use a reasonable quantity for irrigating his land, if there be sufficient to supply the natural wants of the different proprietors. A diversion of water for irrigation is not an ordinary use, and can only be exercised reasonably, and with proper regard to the rights of the other proprietors to apply the water to the same purposes. . . . Prior appropriation, under the doctrine of the Pacific Coast states, is a paramount right, and the rule stated above must be held to apply only after such appropriation for natural wants has been made, when the riparian proprietor would be entitled to a reasonable use of the water for irrigation. It should be

presumed that the prior appropriator, when he makes his appropriation, has taken enough water to supply his natural wants as well as his beneficial use. If his natural wants are supplied, and he has sufficient water for his beneficial use, he ought not to complain because others above divert the water. His right of action is based upon his injury, and, if his wants are all supplied, he cannot be injured. What constitutes a reasonable use depends upon a number of circumstances,—upon the subject matter of the use itself, the size of the stream, the velocity of the current, the nature of the banks, the character of the soil, and a variety of other facts. (Pom. Rip. Rights, sec. 125.) To hold that, after the needs of a prior appropriator had been supplied, he, as a riparian proprietor, was entitled to the flow of the excess beyond his appropriation in the channel of the stream, would be to deny all subsequent appropriations. Such a rule would destroy the very object for which the theory of irrigation was established, and would give the prior appropriator the use of all the water of a stream, without regard to its size or capacity. Plaintiff, by reason of his prior appropriation, was entitled to the amount of water originally appropriated, and, had he then taken all the water from the creek his rights would be respected and maintained. He is entitled to have the water flow in the channel at the head of his ditches to the extent of his appropriation, and when the defendants and their grantors acquired this land they took the same subject to such prior appropriation. (*Kaler v. Campbell*, 13 Or. 596, 11 Pac. 301.) The plaintiff's rights are to be measured by his appropriation, and the defendants, being riparian proprietors, are entitled, after such appropriation, to a reasonable use of the water. It appears that there are about ten acres of plaintiff's land which cannot be irrigated from the waters of Alder creek, and must be irrigated, if at all, from the waters of Hill creek, and hence he is entitled to a sufficient quantity from that creek for this purpose. The evidence shows that from one-half inch to three inches is a sufficient quantity to properly irrigate one acre of land, and that in all probability plaintiff's whole tract can be irrigated from Alder creek, except about ten acres, and that one inch per acre is sufficient for that purpose, and that this quantity

is the measure of his right. The decree of the court below must therefore be reversed, and one entered here giving plaintiff ten inches of the water of Hill creek at his point of diversion, and perpetually enjoining the defendants from diverting any of the portion thus awarded the plaintiff.

Possessory Right to Land—Right to Appropriate.

KENDALL et ux. v. JOYCE et al.

(48 Wash. 489, 93 Pac. 1091.)

RUDKIN, J.—This was a controversy between two land owners over the right to use the waters of Johnson creek, a small stream flowing into the Okanogan river, in Okanogan county, for irrigation purposes. The rights of the respective parties are predicated upon the following facts: In the year 1895 the plaintiff, John Kendall, a citizen of the United States, above the age of twenty-one years, settled upon lots 3, 4, and 5, and the southwest quarter of the southeast quarter of section 25, and lot 1 and the northwest quarter of the northeast quarter of section 36, township 35 north, range 36 east, Willamette meridian, under the homestead laws of the United States. The lands embraced within the settlement were at that time unsurveyed public lands of the United States. Kendall continued to occupy and cultivate his claim from date of settlement until September 11, 1903, at which time he received a homestead patent therefor. Commencing with the year 1895 he diverted the waters of Johnson creek for the purpose of irrigating his orchard and meadow lands and for stock and domestic purposes. He increased the amount of his cultivated land from year to year until 1905, when he had fifty-five or sixty acres under irrigation and cultivation. The testimony showed that he proceeded in good faith and with reasonable diligence in bringing his land under cultivation and in applying the waters diverted to beneficial uses. In the year 1887 one Philip Perkins settled upon the lands now owned by the defendants. On the 9th day of October of that year, Per-

kins filed a notice of claim of water right with the county auditor of Okanogan county, claiming five hundred inches of water from Johnson creek at a certain point, and an additional five hundred inches at a certain other point. He continued to occupy the claim until about the year 1889, when he was succeeded by one Warren Perkins. The latter occupied the claim until 1897, when he was succeeded by William Maretta, and Maretta in turn was succeeded by the defendant Joyce in the year 1899. Joyce has since derived title to the original Perkins claim in part under the homestead law and in part by scripping. Prior to the year 1897 not to exceed five or six acres of the Joyce lands were irrigated or cultivated. Under these facts the court below awarded to the defendants a prior right to use the waters of the creek to the extent of seven miner's inches, measured under a four-inch pressure, to the plaintiffs one-third of one cubic foot per second of time, subject to the prior right of the defendants to the seven miner's inches, and enjoined the defendants from diverting the waters of the creek to the injury of the plaintiffs. From this judgment the defendants have appealed.

Under the facts stated, the respondents having diverted the waters of the creek in 1895 and applied the same to beneficial uses with reasonable diligence, their rights relate back to the date of their original appropriation. (*Offield v. Ish*, 21 Wash. 277, 57 Pac. 809; *Longmire v. Smith*, 26 Wash. 439, 67 Pac. 246, 58 L. R. A. 308.) It is equally apparent that Perkins acquired no rights by filing the notice of claim of water right in 1887. There was then no law authorizing such a notice. The notice was too indefinite to subserve any purpose, and the notice was not followed by a diversion of the water and its application to beneficial uses within a reasonable time. If, therefore, the rights of the parties depend upon the law of prior appropriation, it is manifest that the rights of the respondents are superior to those of the appellants, except as to the quantity of water awarded to the latter by the court below. (The appellants contend that the respondents acquired no rights as appropriators by reason of their failure to post and record a notice of their appropriation as required by the act of March, 1891 (Laws 1891, p. 327, c. 142); but "the statutes requiring the posting and recording of a notice are

not intended to change the rule as to what constitutes a valid appropriation, but simply, by requiring an appropriator to post and record a notice, to apprise other persons contemplating the diversion of water from the same stream that the appropriator has taken the first step toward securing his rights, and also to preserve the evidence thereof. It is accordingly held that, notwithstanding the existence of these statutes, a valid appropriation may be made by an actual diversion and use of the water without posting any notice. The one who fails to comply with the statute requiring notice, but actually diverts and uses the water, acquires a good title in the absence of any conflicting adverse rights, and cannot be deprived thereof by another who complies with the statute at a time subsequent to the former's completed diversion. Thus the failure of an actual appropriator of water upon the public domain to post a notice as required by law does not conflict with his right to the water as against one subsequently acquiring the land from the government." (17 Am. & Eng. Ency. of Law, 2d ed., p. 498.)

The appellants further contend that they acquired certain rights under section 2 of the act of March 4, 1890 (Laws 1889-90, p. 706), as successors in interest of Warren Perkins, who was occupying the land at the date of the passage of that act. The section referred to reads as follows: "All persons who claim, own, or hold a possessory right or title to any land, or parcel of land, within the boundary of the state of Washington, when such lands, or any part of the same, are on the banks of any natural stream of water, shall be entitled to the use of any water of said stream, not otherwise appropriated, for the purposes of irrigation to the full extent of the soil for agricultural purposes." This section was simply declaratory of the existing law, viz., that title acquired under a patent from the United States relates back to the date of settlement or filing. (*Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. ed. 761.) It has never been contended that a mere squatter on public land, who subsequently sells out or abandons his claim, acquires or can acquire riparian rights in a stream flowing through the land. Riparian rights are a mere incident to ownership in the soil, and, while they may relate back by fiction of law to the date of settlement or filing, by

virtue of the patent subsequently issued, yet they do not vest until patent issues; for up to that time the title to the land, with all its incidents, is vested in the United States, utterly beyond the power or control of state legislatures, and the party thereafter acquiring title from the government acquires the land with all its incidents.

We are therefore of the opinion that the respondents have a valid claim to the waters awarded them by the court below, superior to any claim on the part of the appellants, and the judgment is accordingly affirmed.

This

Settlers' Rights—Date from Final Proof—Change of Place of Diversion.

WILLIAM McGUIRE, Respondent, v. MARCELLUS BROWN, Appellant. W. A. DORN, Intervener.
(106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384.)

BRITT, C.—The controversy which resulted in this action arose between plaintiff and defendant concerning the right to the use of water flowing in Cuyama creek, in the county of Ventura. One W. A. Dorn was permitted to intervene, he asserting an interest in the water superior to that of both the original parties; but, as the court below found against his pretensions and dismissed his complaint "without prejudice," and he has not appealed, his claims are eliminated from the case.

It appears from the record that in January, 1885, one Beekman took possession of the northwest one-quarter of a certain section 20, the same being unappropriated lands of the United States, and shortly afterward filed his declaratory statement as a pre-emption claimant thereon, paid the purchase price and obtained the receiver's final receipt some time in the year 1886, and in June, 1891, the United States patent for the same was issued to him. At the time Beekman entered upon said land there was a ditch thereon, constructed by a former occupant, leading from a point on Cuyama creek, within the

boundaries of the northeast one-quarter of said section 20, and thence westerly across a part of such northeast one-quarter and upon said northwest one-quarter, by means of which ditch water was diverted from said creek and made to flow upon the latter quarter section. This ditch was repaired by Beekman in the spring of 1885, and was thenceforward used by him to divert said water for irrigation and for other purposes on his said land—it having a capacity, the court finds, of ninety inches, which was filled when the creek afforded sufficient water, and exhausted the flow of the creek at the point of diversion when the supply was less than that amount.

In December, 1888, Beekman conveyed the land covered by his pre-emption claim—said northwest one-quarter of section 20—together with its appurtenances, to one Crawford, who entered into possession. Crawford then, in May, 1889, *changed the point of diversion* of the ditch to a place about a quarter of a mile farther up the creek, eastward from the head of the old ditch, and dug a new ditch across the said northeast one-quarter, and upon the northwest one-quarter of said section 20, connecting with the old ditch near the west line of said northwest one-quarter. The new ditch had a capacity of ninety inches, as the court also found, and was used by Crawford on his lands from 1889 to 1891, inclusive, for the same purposes that the former ditch had been used by Beekman.

January 20, 1892, Crawford conveyed to plaintiff by deed of grant said northwest one-quarter of section 20, together with all water rights possessed or acquired by the grantor, “either by use, purchase, or appropriation.”

But in August, 1888, Brown, the defendant and appellant, a person qualified to acquire land under the homestead laws, settled upon said northeast one-quarter of section 20, it being then public land of the United States, and in October of the same year he filed his homestead application therefor in the proper land office, paying the fees of the receiver upon such entry and obtaining his receipt therefor; ever since his settlement he has resided on the land, cultivating and improving considerable portions of it, but has not made final proof nor received a patent for the same. When Crawford constructed the new ditch across defendant's homestead claim in 1889 de-

defendant was temporarily absent therefrom and gave no consent to the change, but, on his return soon afterward, he made no complaint or claim of damages, and permitted the use thereof by Crawford and his successor, the plaintiff, until the month of October, 1892, when he filled up such new ditch at a point on his homestead claim and stopped the further flow of the water, and by force prevented plaintiff from repairing the ditch. In November, 1889, defendant constructed a ditch tapping Reyes creek, a tributary of said Cuyama creek, on land in section 16, belonging to the state of California, at or near the point of confluence of the two streams, about one-half mile above the head of the new ditch dug by Crawford in May of the same year, and thence leading to his, defendant's, homestead claim, said northeast one-quarter of section 20. By means of this ditch defendant diverted water from Reyes creek during the years 1890, 1891, and 1892, and used the same for irrigation and other purposes on his claim, not interfering with the flow of water to plaintiff's ditch during the first two of those years, but increasing the amount diverted during 1892, so as to materially lessen the quantity descending to plaintiff. Plaintiff, then, in September, 1892, filled up defendant's ditch on said section 16 so that no water could pass into it from the creek. All the lands above mentioned lie in the same township and range, and are riparian to Cuyama creek.

Plaintiff commenced this action May 4, 1893, to restrain defendant from interfering with the ditch and water rights acquired by plaintiff from Crawford, and for damages; defendant answered and also filed a cross-complaint setting up his claims to the water and to damages for plaintiff's invasion of his rights, and praying that plaintiff be restrained from interference with his use of the water, etc.

After trial the court rendered judgment determining that plaintiff has the paramount right to ninety inches of the water in Cuyama creek, for all useful and beneficial purposes, to be diverted through the ditch constructed by Crawford in 1889, and is the owner of such ditch, with the right to maintain it across the homestead claim of appellant, and enjoining defendant from disturbing plaintiff's enjoyment of such rights. Also that defendant is entitled to take ninety inches

of water flowing at the head of his ditch in section 16, so long as the diversion of that quantity does not reduce the flow at the head of plaintiff's ditch below the same amount; that defendant has the right to maintain and use his said ditch to convey the water to which he is entitled, and plaintiff is restrained from interference therewith. Plaintiff is awarded the entire flow of water at and above the head of the Crawford (new) ditch when the quantity falls below ninety inches; also judgment for nominal damages and his costs.

1. The first and most important question arising on this record relates to the right of Crawford, plaintiff's predecessor in interest, to enter upon the land claimed by and in possession of defendant, and, in the exercise of the right to change the point of diversion, there construct a new aqueduct and lead the water through the same. For if he had not the right to effect the change in this manner, then the defendant was not in the wrong when he obstructed the flow of the water in the new ditch, and the judgment restraining him in that behalf, and establishing the right of plaintiff "to have, maintain, keep and use" such new ditch for diverting and conveying the water upon his, plaintiff's, land is erroneous.

The claim that Crawford, the former ditch owner, was justified in shifting the point of diversion and the line of his ditch in the manner here disclosed is based mainly on the familiar provisions of the legislation of Congress, sections 2339 and 2340 of the United States Revised Statutes, concerning the rights of the appropriators of water on the public lands and the saving of those rights in patents for such lands granted by the government; on section 1412 of the Civil Code of this state: "The person entitled to the use may change the place of diversion if others are not injured by such change"; and on certain cases in this court which will be noticed further on.

We do not think that the right of the settler, under the federal homestead laws, on public land through which water flows is of the unsubstantial character which the contention of respondent implies. . . . Has the prior appropriator license to enter upon the homestead claim of such a settler

for the purpose of materially changing thereon the point of diversion and constructing new waterways through the land? Is such a license among the servitudes to which the land must be submitted?

We think not. "In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. . . . It appears from the evidence in this case that on October 22, 1888, the defendant made entry (within the meaning of the authorities referred to) of the land in question in the proper United States land office, and that his entry remains intact.

Crawford, a witness for plaintiff, testified: "When I went there in 1888 Brown was on the northeast one-quarter of section 20, and I think had a house. . . . When I made the change in my ditch Mr. Brown was in possession of his land. We had a fence between us, so I ran with my new ditch through his fence."

Here was an entry, and here was an actual possession of the land by defendant. In course of time, and on compliance with the law relative to continuous residence and cultivation, he will be entitled to a patent which will invest him with the legal title. Now, it cannot be that, pending proceedings for the consummation of his interest thus initiated, any other person may rightfully invade his possession for the purpose of making an original appropriation of water, and so possibly divesting the land of its chief element of value, any more than for the purpose of cutting off its timber or committing other trespass. . . .

It must be remembered that the appropriator is not the owner of the "very body of the water" until it passes into the appliances he has provided for its reception; before he is thus possessed of it he has a mere right to its continued flow, so that he may impound it; but the stream itself, flowing in its natural course, is a part of the land over which it flows. (*Parks etc. Co. v. Hoyt*, 57 Cal. 46; *Nevada County etc. Co. v. Kidd*, 37 Cal. 310, 311.) And it follows that after the land where the diversion is made has ceased, by reason of a lawful private appropriation thereof, to be public land and passed into private occupancy, the occupant of the land—in this case the homestead claimant—is the owner of the stream, in the

same sense that he is the owner of the land, until it comes into the possession of the appropriator, and may justly repel any attempt to interfere with such ownership at any place except that where the diversion was effected when his rights to the land attached.

Nor is this necessarily a mere empty abstract right; the stream may add beauty to the landscape or afford valuable fishing privileges or furnish useful mechanical power, any of which elements of value would be liable to destruction if the prior appropriator may remove his point of diversion wheresoever he will after the inception of private title to the land in another person. . . .

The new ditch over defendant's claim, established as a legal right of plaintiff by the judgment appealed from, was constructed in virtue of an intrusion on defendant's possession during the latter's temporary absence from his home, and through artificial barriers erected by him; such acts, if tolerated at all, must certainly tend to the promotion of the evils prefigured in the language of the court just cited. . . .

It follows that the defendant had the right to obstruct the flow of water across his claim in plaintiff's new ditch, and the court below erred in restraining him from so doing. And, since the plaintiff insisted on taking, and did take, the water by means and at a place unwarranted by his rights as a prior appropriator, it results further that the defendant, as entitled to the flow of the water after supplying the *lawful* requirements only of the plaintiff, had the right to use the same, and should recover the damages, if any, which he sustained by reason of the destruction of his dam and the filling of his ditch by plaintiff, and his consequent deprivation of the water.

2. But the plaintiff had the prior right to the use of the water to the extent of the appropriation made by his predecessors, Beekman and Crawford, through the old ditch, prior to the defendant's settlement, together with the right to maintain such ditch. Brown's claims as a homestead settler were subordinate to those interests and his land was subject to a servitude for the support of the same. (*De Necochea v. Curtis*, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; *Wells v. Mantec*, 99 Cal. 583, 34 Pac. 324.) It would be inflicting a

severe penalty for the trespass committed by Crawford on the land of Brown and the attempt to shift the location of the ditch to hold that by that circumstance alone Crawford lost for himself and his successor, the plaintiff, all prior right to the flow of the water itself; he certainly did not intend to abandon his interest in the water. Whether he abandoned his property in the former ditch, and the right to lead water through the same, is a question which has not been argued here or apparently litigated below, and ought not to be now decided; but the parties should be allowed, if they desire, to amend or supplement their pleadings, and to have determined in the trial court the issue just suggested and any other necessary to the adjustment of their relative rights under the law as stated in this opinion.

We recommend that the judgment against the defendant and the order appealed from be reversed, and the cause remanded for a new trial and other proceedings not inconsistent with this opinion, both parties to the appeal having leave to amend their pleadings as they may be advised.

Appropriation—Means of Conducting Water and of Division—Priority.

**LOWER TULE RIVER DITCH COMPANY, Respondent, v.
ANGIOLA WATER COMPANY, Appellant.**

(149 Cal. 496, 86 Pac. 1081.)

SHAW, J.—Appeal by defendant from a judgment in favor of plaintiff and from an order denying defendant's motion for a new trial.

The court found, in effect, that plaintiff was seised of a prior right, as against the defendant, to divert from Tule river, a stream of water thereof amounting to a continuous flow of twenty-three feet per second, and gave judgment enjoining the defendant from interfering therewith. Neither party is a riparian owner on the stream, both claiming solely by appropriation and use. The claim of defendant is based

on a notice of appropriation under the code, posted on August 27, 1897, and a subsequent diversion and use in pursuance thereof. With respect to the plaintiff's claim the finding is, in effect, that it is founded on an appropriation and use made by N. P. Duncan, plaintiff's grantor, in May, 1897. The sole objection presented on this appeal is that the evidence is insufficient to show a diversion and use by Duncan prior to the posting of defendant's notice of appropriation, or to show that such diversion was made with the intent and purpose to apply the water to any beneficial use, or that any beneficial use was made thereof prior to such posting.

We think there is sufficient evidence on these points to uphold the findings and the judgment. Duncan was a witness for the plaintiff, and testified, in substance, that in May, 1897, in order to get water to irrigate his land, he had a cut made in the levee confining the water of the river, thereby diverting the water into an excavation that had been made along the outside of the levee; that he made use of this excavation which was for practical purposes a ditch, to conduct the water to his land; that he got the water to irrigate his land at that time, and that by means of it he irrigated about two sections of his land for the purpose of growing thereon wild grasses and feed. H. Clawson also testified that he saw the water, in May, 1897, running from the river through the cut in the levee, and that the water thus taken was used during that season to irrigate all of Duncan's land, together with lands of others, amounting in the aggregate to somewhere near four thousand acres. There was no evidence offered in contradiction of this testimony.

This was sufficient proof of the intent, the diversion or appropriation, and the beneficial use prior to the posting of the defendant's notice. A person who is making an appropriation of water from a natural source or stream is not bound to carry it to the place of use through a ditch or artificial conduit, nor through a ditch or canal cut especially for that purpose. He may make use of any natural or artificial channel, or natural depression, which he may find available and convenient for that purpose, so long as other persons interested in such conduit do not object, and his appropriation so made will, so far as such means of conducting the

water is concerned, be as effectual as if he had carried it through a ditch or pipe-line made for that purpose and no other. . . .

For the same reasons it is unnecessary that there should be any headgate of boards or masonry at the place of diversion. If a simple cut will accomplish the purpose of diverting the water from the stream, it is, if accompanied with a beneficial use, a good appropriation as against others making a subsequent diversion and use. There was some testimony indicating a dual intent on the part of Duncan,—that is, a purpose not only to get water to irrigate his land, as stated, but also to draw off the flood water from, and prevent it flowing to, some other land owned by him on which he then had a growing crop of grain. This purpose to drain one tract of land did not vitiate or destroy the right to take the water for irrigation of other tracts, nor impair the right, acquired by such appropriation and use, to take and use it for the latter purpose. The two purposes are not inconsistent.

In order to make a valid appropriation it was not necessary for Duncan to post and record a notice of appropriation as provided in the Civil Code (secs. 1415-1721). The method of acquiring a right to the use of water as there prescribed is not exclusive. One may by a prior actual and completed appropriation and use, without proceeding under the code, acquire a right to the water beneficially used, which will be superior and paramount to the title of one making a subsequent appropriation from the same stream in the manner provided by that statute. . . .

The judgment and order are affirmed.

Prior and Subsequent Appropriators—"Coming to a Nuisance."

TENNEY v. THE MINERS' DITCH CO. *this*

(7 Cal. 335.)

The plaintiff brought this action for damages to his mining claim, sustained by reason of the breaking away of a portion of defendants' ditch, owing to the careless manner of its construction and the consequent overflowing of plaintiff's claim. It appeared by the record that plaintiff had located his claim subsequent to the construction of defendant's ditch. The question of negligence was submitted to the jury as a question of fact, under the instructions of the court below, and they found a verdict for defendants. The substance of the evidence on the question of negligence is stated in the opinion of the court, as well as the instructions asked by plaintiff, and refused by the court below, which refusal is assigned as error. Motion for a new trial was made and overruled, and judgment entered for defendants.

Plaintiff appealed from the order overruling the motion for a new trial. . . .

MURRAY, C. J., delivered the opinion of the court—TERRY, J., concurring.

This was an action of trespass on the case for negligence in constructing a water ditch so that it gave way and flooded the plaintiff's mining claims. Judgment for defendants, and motion for new trial overruled, from which plaintiffs appeal.

The error assigned by the appellant is the refusal of the court to give the following instruction: "That when a ditch is insufficient, and breaks from the weight or quantity of water permitted to flow through the same, the law presumes negligence in its construction or continuance, and if from the evidence the jury believe that the defendants' ditch was insufficient to carry the water and broke from the weight or quantity allowed to flow through the same, and that the plaintiffs were injured by such breakage, the jury will find for plaintiffs." The correctness of this instruction must depend upon the testimony before the jury.

It appears from the record that the question of negligence has been submitted to them as a question of fact under the instructions of the court; that evidence had been introduced by the defendants to disprove the charge or exculpate themselves. It was shown, among other things, that the sides of the ditch at the place it gave way had been dug down or injured by some burrowing animal, and also that a tree had accidentally fallen across it, causing the water to dam up, and thereby creating a greater pressure upon the sides of the ditch. It was further shown that the defendants had located and constructed their ditch previous to the location of the plaintiffs' mining claims. No negligence, in fact, was shown, other than that which the law would presume from the breakage of the ditch.

The important fact having been admitted, that neither of the parties claim as holders of the soil, but simply by virtue of location and appropriation, it becomes necessary to ascertain what rights the plaintiffs, who were subsequent locators, acquired against the defendants.

Some of the earlier English authorities recognize the doctrine that a person may (even as between owners of the soil) construct or continue what would otherwise be an actionable nuisance, provided that, at the commencement of it, no person was in a condition to be injured by it, or, in other words, that mere priority as between owners of the soil gave a superior right. If a person afterward by building, or otherwise, put himself in a situation to be injured by such structure, it was termed "coming to a nuisance."

This doctrine has long since been exploded on the most obvious principles of sound reason. The right of the owner of the soil to the free use and enjoyment of the same is held to exist anterior to any erection that may be made by an adjoining proprietor, and in such cases the maxim "*Sic utere tuo ut alienum non laedas*" applies. It will be observed that the reason of the rule is founded on the ownership of the soil, and that as between proprietors the same rights or privileges are supposed to exist (except in some few instances); but in a case like the present, where neither party claims an ownership in the soil, and all the rights they possess relate back, or are acquired at the date of their respective locations, the

reason of the rule ceases, and the maxim "*Qui prior est in tempore, potior est in jure*," as applied by this court to cases involving disputes growing out of mining claims, would seem more applicable.

In fact, any other rule would allow a malevolent person to make a trespass whenever he pleased, by settling along the line of a water ditch or canal where he supposed, from its location or construction, it was most likely to give way. There is no doubt that the owners of a ditch would be liable for wanton injury or gross negligence, but not for a mere accidental injury where no negligence was shown. In such cases, the maxim "*Sic utere*," etc., must be construed with reference to the rights of all the parties concerned, and no man can be deprived of the due enjoyment of his property and held answerable in damages for the reasonable exercise of a right. (*Ostrander v. Brown*, 15 Johns. 43; *Panton v. Holland*, 17 Johns. 99; *Townsend v. President, etc.*, 6 Johns. 90; and 3 Man. & G. 315.) In the latter case it was held that a railroad company were not liable for damages caused by fire from sparks from their engine, unless negligence was proven by the plaintiff.

Having thus established what we believe to be the law of the case, it follows that the court properly refused the instruction asked.

Judgment affirmed.

Appropriation—Diligence—Abandonment—Priority

COLE et al. v. LOGAN.

(24 Or. 304, 33 Pac. 568.)

Action by J. L. Cole and Benjamin F. Kendall against William L. Logan to enjoin defendant from diverting the waters of a certain creek. From the decree rendered both parties appeal. Modified.

The other facts fully appear in the following statement by MOORE, J.:

This is a suit to enjoin the defendant from diverting the waters of Willow creek. The material facts are that Willow creek rises in a spur of the Blue mountains, flows in a southeasterly direction, in a well-defined channel, through the lands of the parties hereto, and empties into the Malheur river in Malheur county, Oregon. That the defendant has diverted the waters thereof by a ditch on the north side of the creek, and the plaintiffs by a ditch on the south side, and that their lands are arid, and nearly valueless without water, but by irrigation they have become very productive, and yield large crops of hay and fruit. That defendant settled upon his tract in July, 1870, built a dam in the channel of the creek, dug a ditch, and conducted the water to a garden of about two acres, cultivated by him in 1871. That on January 27, 1872, the said tract having in the meantime been surveyed and platted as the east one-half of the northwest one-quarter and the west one-half of the northeast one-quarter of section 24, in township 15 south of range 42 east of the Willamette meridian, he filed a pre-emption declaratory statement thereon, which on November 3, 1874, he commuted into a homestead, made his final proof July 5, 1880, and on December 10, 1880, obtained the United States patent therefor. That the plaintiff J. L. Cole, in October, 1871, made a homestead filing upon the south one-half of the southeast one-quarter, the northwest one-quarter of the southeast one-quarter, and the northeast one-quarter of the southwest one-quarter of section 14, in said town and range, and on November 30, 1878, obtained a patent from the United States therefor. That about December 10, 1872, the said Cole and one C. Eaton commenced to build a dam in the channel of said creek at a point about three miles above defendant's dam, which they completed about January 10, 1873, and about three months thereafter they had completed about one mile of the ditch from the dam toward their lands. That Eaton assigned his interest in the ditch to one James Cole, who filed a pre-emption claim upon the southwest one-quarter of the northwest one-quarter and the northwest one-quarter of the southwest one-quarter of section 14, in said town and range, and on October 30, 1882, obtained the United States patent therefor, which tract of land and interest in the ditch he conveyed to the plaintiff

B. F. Kendall, who is now the owner thereof. That in October, 1871, the defendant surveyed a line for a new ditch from his homestead to a point on the creek about one mile below that where plaintiffs afterward built their dam, and on January, 1872, filed with the county clerk of the proper county a notice of his claim to appropriate two hundred and fifty inches of water of said creek, and commenced to dig the ditch on the line of the survey, but, encountering quicksand after completing it to a point within six feet of the creek, he was obliged to abandon it, and in 1873 surveyed another line to a point about thirty yards above plaintiffs' dam, and commenced to dig a ditch on the new line, and, after working thereon each year, and expending about \$2,000, he completed it in 1883. That the plaintiffs assisted him in building a new dam, moved their tap to this point, and, as they testify, agreed that the defendant might have the surplus water of the creek. That on March 6, 1883, the defendant acquired the legal title from one W. R. Kelly and wife to the northeast one-quarter of the southeast one-quarter of said section 14, and moved to a house thereon, about one-half mile from his former home. That the defendant also claimed a possessory right to the southwest one-quarter of section 13, in said town and range, upon a pre-emption filing thereon, but that the title thereto was also claimed by the Dalles Military Wagon Road Company. That from 1872 to 1891 the El Dorado Ditch Company had diverted about one thousand inches of water from Burnt river, and discharged it into Willow creek about twelve miles above defendant's homestead; and that in 1877 the defendant had permitted the Willow Creek Irrigating Company to enlarge the ditch first made by him, and convey the water of Willow creek across his homestead, to irrigate lands lying below his claim. That a small stream, known as "Becker creek," flowed across the Kelly tract, and another small stream, known as "Pole creek," flowed across the plaintiff Cole's land, and each emptied into Willow creek at places above the defendant's point of diversion on his homestead. That Kelly and the defendant used the waters of Becker creek in irrigating the Kelly place, and that Cole had used the waters of Pole creek. That the defendant, prior to 1877, had cultivated about twelve acres of his homestead, but that after the Willow Creek Irri-

gating Ditch Company had enlarged his ditch the cultivated land on the homestead had nearly grown up with willows. That the plaintiffs and defendant used the same dam, and diverted the waters of the creek at opposite points, from 1884 to 1889, when, the dam becoming filled with debris from the mines above, plaintiffs moved their tap farther up the stream, and on May 19, 1891, the defendant moved his tap above theirs, and diverted the water for five hours, whereupon the plaintiffs again moved their ditch above his, diverted all the water of the creek, and commenced this suit, in which they allege a prior appropriation of the whole amount of water, consisting of about four hundred inches, and a diversion thereof by the defendant, who denies the allegations of the complaint, except the diversion of one hundred and fifty inches, and alleges that he was the prior appropriator of the said waters. After the issues were completed, the testimony was taken before a referee, and at the hearing the court found that defendant was the prior appropriator of twenty inches of water, and decreed that he was entitled to divert that quantity under a six-inch pressure, and that plaintiffs were entitled to divert three hundred inches under a like pressure, and that neither party should recover costs, from which decree the defendant appeals; while the plaintiffs appeal from so much thereof as decrees the prior right of defendant to twenty inches of water, and enjoins them from interfering therewith, and also from the portion thereof relating to costs.

R. G. Wheeler and J. L. Rand, for Appellant.

M. L. Olmsted, for Respondents.

MOORE, J. (after stating the facts).—The evidence conclusively shows that the defendant was a prior appropriator of the waters of Willow creek. He made his settlement upon an unsurveyed tract of land with the intention of acquiring the title thereto from the government of the United States, and had diverted and appropriated the water of said creek two and one-half years prior to the building of plaintiffs' dam; and when the defendant made his proof and obtained his patent his title related back to the time of his settlement (*Faull v. Cooke*, 19 Or. 455, 20 Am. St. Rep. 836, 26 Pac. 662; *Larsen*

v. *Oregon etc. Navigation Co.*, 19 Or. 240, 23 Pac. 974; *Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. ed. 761), and hence it follows that at the time plaintiffs made their appropriation of the waters of Willow creek the defendant's rights as a prior appropriator had attached, and he was entitled to the quantity of water he had diverted and appropriated for the purpose of irrigating his homestead, and that the plaintiffs made their diversion and appropriation subject thereto. (*Kaler v. Campbell*, 13 Or. 596, 11 Pac. 301.) The evidence shows that on Willow creek there was a local custom which required the claimant to file for record with the county clerk a notice of his claim to appropriate the water of a natural stream, and that in pursuance of such custom the defendant, in January, 1872, filed with the county clerk of Baker county a notice of his claim to appropriate two hundred and fifty inches of the water of said creek upon the line of his survey made in October, 1871. If, instead of being obliged to abandon his ditch on this line in 1873, he had completed it, so as to have been able to divert the water thereby, and appropriate it in irrigating his homestead, he would doubtless have had a prior right to the use of a sufficient quantity to irrigate his land, assuming that his diversion was begun within a reasonable time, and was prosecuted with due and reasonable diligence; and his appropriation would have related back at least to the time of commencing the work, if not to the time of giving the notice, or to the time of the survey. (Pom. Rip. Rights, sec. 52.) When he abandoned the survey of 1871, and made another to tap the creek at or near plaintiff's dam, in order to enable him to hold the rights acquired under such original survey, he must have commenced the diversion within a reasonable time, and must have prosecuted it with due and reasonable diligence. While the evidence shows that the ditch on the line of the new survey was commenced in 1873; that some work was done thereon each year, and that it was completed so as to divert the water in 1883, at a cost of about \$2,000,—it fails to show what amount of labor or of money was expended thereon in any one year, and the defendant pleads as an excuse for the delay his inability to raise the necessary means to prosecute the work. . . . The evidence further shows that from 1871 to 1873 the defendant dug about

one and one-quarter miles of ditch, and that quite a portion of it was through quicksand, but that it took ten years to dig about one and one-half miles to complete the new ditch. It does not appear that there was much difference in the character of the country through which the new ditch was dug, as compared with that along the line of the old one, nor that it was difficult to procure labor or material for the work; and, defendant's only excuse for delay being pecuniary inability, we must conclude, in connection with the other facts, that the defendant did not prosecute his diversion with due and reasonable diligence, and that he could have completed the ditch much sooner than he did. The authorities clearly show that the claimant's pecuniary condition is not an excuse, and, though the doctrine may seem harsh, it is, nevertheless, right. If the rule were otherwise, the prior settler on a creek, if he were ill or poor, could make a survey from his claim to some desirable point above him on the stream, or give any other notice of his intention to appropriate the water, and, by doing such work as his health or means would permit, could ultimately divert the water at such point, and claim a prior right, without regard to the number of subsequent appropriators below such point of diversion or above it, when the water was used and returned before it reached the claimant's land. Hence, it follows that defendant could not by the completion of his ditch in 1883 claim a diversion of the water so as to relate back to 1871, and that the diversion at this point was subsequent to plaintiffs. The defendant, however, having made a prior appropriation of the water at his homestead, has the prior right to the use thereof, unless he has abandoned his claim thereto. The fact that he in 1873 commenced the survey of another ditch from his homestead to tap the creek at a point farther up the stream shows that he had not abandoned the idea of irrigating his land; and while it appears that his old ditch had been, in 1877, enlarged and used, with his consent, by the Willow Creek Irrigating Company, it also appears that from 1872 to 1891 the El Dorado Ditch Company had diverted about one thousand inches of water from Burnt river, and discharged the same into Willow creek at a point above defendant's homestead, and thus it would

seem to follow, in the absence of any evidence of the right of the Willow Creek Irrigating Company, that it took no rights from the defendant therein except as to the surplus water from Burnt river, and that defendant had claimed and reserved his rights to the use of his original diversion from Willow creek. The defendant, as a prior appropriator, is entitled to a quantity of water sufficient to irrigate his homestead, and his original appropriation may be made with reference to the quantity of water needed to irrigate the land he designs to put into cultivation. "The needs or purpose for which the appropriation is made is the limit to the amount of water which may be taken." (*Simmons v. Winters*, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7.) The defendant, as a prior appropriator, did not find it necessary to divert or appropriate in 1871 all the water he ultimately intended to use in the irrigation of his lands. As he adds to the area of his cultivated land he may increase the amount of his diversion until he has acquired the quantity necessary to properly irrigate the whole tract, and any subsequent appropriator diverts the water subject to such prior claim. To entitle the defendant, however, to the benefit of such an appropriation, he should within a reasonable time apply the water to such beneficial use. As fast as he could reasonably put his homestead into cultivation, he is entitled to divert and use the water for that purpose. The rule established in *Simmons v. Winters*, *supra*, is just and reasonable; but it is not intended that because a prior appropriator is entitled to a given quantity of water necessary to irrigate the land he intends to cultivate he can suspend his improvements an unreasonable time, and then, by adding to the area of his cultivated land, be restored to his original intentional diversion, when subsequent appropriators have acquired rights in the stream. The fact that he for an unreasonable time delays additional cultivation should be construed into an abandonment of his original claim to divert a sufficient quantity to irrigate his whole tract, and his appropriation, after such unreasonable delay, should be confined to his necessary use, as applied to the lands he had cultivated within a reasonable time before subsequent rights had accrued. (*Hindman v. Rizer*, 21 Or. 112, 27 Pac. 13.)

The evidence also shows that defendant had at one time cultivated on his homestead about twelve acres, but that since he moved from that tract he not only failed to add to its improvement, but has permitted the portion of it so cultivated to grow up in willows, which, taken in connection with the facts and circumstances of the case, indicate that the defendant had abandoned his intention to increase the area of cultivated land upon his homestead. The court below found that twenty inches was the quantity to which he was entitled, and, while there is much conflict of testimony upon this subject, we do not feel like disturbing this finding. It is to be presumed, however, that since the waters of Becker creek flow across the Kelly tract, and the defendant uses it for irrigation thereon, the court must have considered this fact, and that the award of twenty inches must have been from the waters of Willow creek, and did not include any of the waters of Becker creek. The defendant, having made a diversion of the water in 1871, could not thereafter change the point of his diversion if it injuriously affected the rights of any subsequent appropriator. (*Kidd v. Laird*, 15 Cal. 161, 76 Am. Dec. 472; *Butte Table Mountain Co. v. Morgan*, 19 Cal. 609.) Did the change of the point of diversion injuriously affect the plaintiffs? It appears from the evidence that the plaintiffs diverted and used all the water of the creek, but that the plaintiff Kendall returned the waste water to the creek at a point above, and the plaintiff Cole at a point below, defendant's land. If Kendall, as a subsequent appropriator, had, with knowledge of the defendant's diversion, tapped the creek at a point above, used and returned the whole volume of the water above the defendant's point of diversion, the defendant could not have been injured thereby; while under the same state of facts the defendant, by changing his point of diversion, and tapping the creek above Kendall's dam, could have taken the whole amount of the water, and would have injuriously affected that plaintiff. If, by taking the whole the plaintiff Kendall would have been affected, he would also have been affected injuriously by the taking of a part, and hence it follows that any change made by the defendant to a point above plaintiff's dam would injuriously affect their right. The defendant is entitled to the flow of twenty inches

of water in the channel of the creek, and may divert the same, at any point below the plaintiff's dam, for the purpose of irrigating any of his lands. The testimony does not show what amount of water flows in the channel of the creek at any place below this dam, and the plaintiffs will be enjoined from diverting the waters from the channel of said creek so as to reduce defendant's supply to less than twenty inches of water, not including that of Becker creek, and this quantity will be measured under a six-inch pressure, at a point below that where the plaintiff Kendall's ditch enters the creek. . . . The decree of the court below will be modified and one entered in accordance with this opinion.

Appropriation—Easement—Forfeiture of Right.

MARY ELLA SMITH et al., Respondents, v. PATRICK HAWKINS, Appellant.

(110 Cal. 122, 42 Pac. 453.)

THE COURT.—Action begun in October, 1892, to *quiet the alleged title of plaintiffs to a dam, ditch, and water right* for the diversion of the waters of Wolf creek, in Nevada county. As early as the year 1862, one John Ross was in possession of the ditch and sold water from the same. The ditch claimed by plaintiffs is two-thirds of a mile in length; its original capacity was four hundred and fifty-seven inches of water, though it seems to be now so filled up as to be capable of carrying about one hundred inches only. Plaintiffs claim in virtue of a deed to them executed by Ross in March, 1888, which, for the purposes of the decision, we shall assume was sufficient to convey his title to the property in dispute. Since the year 1875, taxes have been annually assessed against such property and paid by Ross and his successors, the plaintiffs. In 1890 it was leased by plaintiffs to persons who made no use of it, but who paid two months' rental therefor at fifteen dollars per month.

Defendant owns a piece of land lying below the head of the Ross ditch and riparian to said creek; one-fourth of a mile of the length of such ditch is on defendant's said land, and was there constructed before defendant settled on the same; he having acquired title to the land under the federal homestead laws, the patent therefor was issued to him in 1891. In 1879 the defendant constructed a ditch tapping the creek about fifty feet below the Ross dam and having a capacity of two hundred inches of water under six-inch pressure; and, by that means, for thirteen years next before the commencement of this action continuously, uninterruptedly, with a claim of right, peaceably and with the knowledge of plaintiffs and said Ross, defendant diverted such water to the extent of the capacity of his ditch, and used the same for agricultural purposes on his said land. For the period of five years and more next before the commencement of the action, the dam, ditch, and water right claimed by plaintiffs have not been used by Ross, or anyone who has succeeded to his interest, for any useful or beneficial purpose; neither he nor they have ever owned any property below the head of that ditch to which the water could be applied; for any purpose of profit its use was contingent on its sale or rental to other persons; and this occurred very infrequently. The court found that plaintiffs are the owners of the property claimed by them; that enough water flows in the creek to fill both ditches to their full capacity; that the use of the water by defendant has not been adverse; that his rights to the water are subordinate to those of plaintiffs; and gave judgment in plaintiffs' favor. We think these conclusions are contrary to the evidence in several particulars.

1. The finding that during the time defendant has diverted the water an excess has flowed in the creek above the capacity of both ditches finds support in an observation only of the judge of the court below who visited the premises just prior to the judgment in the action—rendered April 3, 1893—and then saw water flowing in the creek as stated in the finding. This single observation, made near the close of the rainy season, is wholly insufficient to sustain the finding in view of other uncontradicted evidence that during one season all of the water of the creek was taken in one of the ditches.

2. Plaintiff's predecessor in interest appropriated water by means of his ditch, and conveyed it over and across the land of the defendant, which, at the time of appropriation, was a part of the public domain. While the rights of rival claimants and appropriators, as between themselves, had for a long time been recognized and adjusted, both by mining custom and adjudications in the state courts, it was not until 1866 that they met with federal cognizance and sanction. In that year the United States conferred upon those who had or who might thereafter appropriate water, and conduct the same over the public land, a license so to do; and further provided that all patents granted, or pre-emptions or homesteads allowed, should be subject to any such vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as might have been acquired under or recognized by the act. (U. S. Rev. Stats., secs. 2339, 2340.)

An appropriator of water under these circumstances, and while the land which he subjects to his necessary uses continues to be part of the public domain, is a licensee of the general government; but when such part of the public domain passes into private ownership it is burdened by the easement granted by the United States to the appropriator, who holds his rights against this land under an express grant. In this essential respect, that is to say, in the origin of the title under which the servient tenement is subjected to the use, one holding water rights by such appropriation differs from one who holds water rights by prescription.

The differences are twofold. A prescriptive right could not be acquired against the United States, and can be acquired only by one claimant against another private individual. Again, such an appropriation, to perfect the rights of the appropriator, does not necessitate use for any given length of time, while time and adverse use are essential elements to the perfection of a prescriptive right. One who claims a right by prescription must use the water continuously, uninterruptedly, and adversely for a period of at least five years, after which time the law will conclusively presume an antecedent grant to him of his asserted right.

Section 811 of the Civil Code, subdivision 4, discussing the extinguishment of servitudes, declares: When the servitude is

acquired by enjoyment, disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment extinguishes the servitude. That this section cannot in strictness be applied to rights under such an appropriation as we have been discussing becomes obvious when, as above pointed out, it is considered that there is no period prescribed for acquiring title to such rights. Section 811, therefore, deals with the extinguishment of servitudes resting upon prescriptive right, a right vesting by reason of continued adverse enjoyment.

Section 1411 of the Civil Code declares that the appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases. This section deals with the forfeiture of a right by nonuser alone. We say nonuser, as distinguished from abandonment. If an appropriator has, in fact, abandoned his right, it would matter not for how long a time he had ceased to use the water, for the moment that the abandonment itself was complete his rights would cease and determine. Upon the other hand, he may have leased his property, and paid taxes thereon, thus negating the idea of abandonment, as in this case, and yet may have failed for many years to make any beneficial use of the water he has appropriated. The question presented, therefore, is not one of abandonment, but one of nonuser merely, and, as such, involves a construction of section 1411 of the Civil Code. That section, as has been said, makes a cessation of use by the appropriator work a forfeiture of his right, and the question for determination is, How long must this nonuser continue before the right lapses?

Upon this point the legislature has made no specific declaration, but, by analogy, we hold that a continuous nonuser for five years will forfeit the right. The right to use the water ceasing at that time, the rights of way for ditches and the like, which are incidental to the primary right of use, would fall also, and the servient tenement would be thus relieved from the servitude.

In this state five years is the period fixed by law for the ripening of an adverse possession into a prescriptive title. Five years is also the period declared by law after which a

prescriptive right depending upon enjoyment is lost for non-user; and for analogous reasons we consider it to be a just and proper measure of time for the forfeiture of an appropriator's rights for a failure to use the water for a beneficial purpose.

Considering the necessity of water in the industrial affairs of this state, it would be a most mischievous perpetuity which would allow one who has made an appropriation of a stream to retain indefinitely, as against other appropriators, a right to the water therein, while failing to apply the same to some useful or beneficial purpose. Though during the suspension of his use other persons might temporarily utilize the water unapplied by him, yet no one could afford to make disposition for the employment of the same, involving labor or expense of any considerable moment, when liable to be deprived of the element at the pleasure of the appropriator, and after the lapse of any period of time, however great.

The failure of plaintiffs to make any beneficial use of the water for a period of more than five years next preceding the commencement of the action, as found by the court, results from what has been said in a forfeiture of their rights as appropriators.

The judgment and order are reversed.

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**Abandonment of Decayed Part of Flume—Appropriation—
Advice of Counsel.**

F. W. WOOD et al., Appellants, v. ETIWANDA WATER
COMPANY, Respondent.

(147 Cal. 228, 81 Pac. 512.)

VAN DYKE, J.—On November, 1893, plaintiffs commenced an action in the superior court of San Bernardino county against the Etiwanda Water Company and the California Improvement Company for the purpose of obtaining a perpetual injunction restraining the defendant from maintaining a pipe across the lands of the plaintiffs, and from diverting waters

from the East Canyon, or Etiwanda creek, through that pipe, the plaintiffs being the owners as tenants in common of a considerable tract of land, through which said creek flowed. Upon the trial of said action the court found that the stream of water known as East Canyon creek rises in the mountains above the lands of the plaintiffs, and in its natural course flows down through said lands; that in 1882 the Etiwanda Water Company constructed and used a flume in lieu of an open ditch, which many years before had been used by said defendant's grantors for the diversion of said water, and that said flume was not an original diversion of water, but was a continuation of the diversion before made by the grantors of the defendant; that more than twenty years before the commencement of said action the defendant's grantors appropriated and diverted all the water of said Canyon creek at a point near where the said creek flows from the canyon, for household and domestic use and irrigation upon the lands then owned and possessed by them, and conveyed said water to their said lands for such use, and that ever since, and down to the commencement of the said action, said defendant and its grantors have diverted and used said water for said purposes, to the extent of one hundred and twenty-five inches, measured under a four-inch pressure, and all the water so diverted had been used for said purposes. During all of said time said defendant and its grantors were, and said defendant, Etiwanda Water Company, now is, the owner of the right so to divert and use the said water to the extent aforesaid. It is also found that defendant, in June, 1892, commenced to lay pipe across the plaintiffs' lands, and that said pipe was substituted for said flume for a portion of the distance across said lands, and was constructed and laid substantially along the course of the old flume, which latter had been wholly disused, except the first portion thereof, and that said pipe-line was so constructed without the consent and against the wishes of the plaintiffs, and was without right; and as a conclusion of law the court found that the plaintiffs were entitled to judgment perpetually restraining the Etiwanda Water Company, defendant, from maintaining or using the pipe-line described in the pleadings, and referred to in said findings; and, as a further conclusion of law, found

that the defendant, the Etiwanda Water Company, was entitled to judgment that it is the owner of the right to maintain the dam and flume described in the pleadings and referred to in said findings of fact, and to divert the water of East Canyon creek to the extent of one hundred and twenty-five inches measured under a four-inch pressure.

The plaintiffs in that action appealed to this court from the portion of the judgment wherein it was adjudged that the Etiwanda Water Company was the owner of the right to maintain the dam and flume referred to. The defendant, however, acquiesced in the findings and decree in the lower court, and at once proceeded to, and did, remove the pipe, and thereupon restored the flume, as originally constructed, before the appeal was taken on the part of the plaintiffs. In the opinion in this court on the appeal, *Wood v. Etiwanda Water Co.*, 122 Cal. 160, 54 Pac. 729, it is said: "The defendant, by its failure to appeal, acquiesced in the finding and judgment that the pipe-line was constructed without right, and that it be perpetually enjoined from using it, a contingency that might have been anticipated by the defendant and the question made as to its right to construct a flume to take its place. Besides, it might well be questioned whether there is any finding that will support that part of the judgment appealed from. The court found that the flume had been used from 1882 to 1882, that it was then 'abandoned' and destroyed, except a few feet near the dam, and unless it can be said as a conclusion of law that the flume, having once existed, and having been voluntarily destroyed and abandoned, may be rebuilt and the servitude upon plaintiff's lands be recreated or renewed at defendant's will, there would seem to be no basis for the judgment appealed from. . . . The question of defendant's right to reconstruct the flume has been argued in the briefs, but as the question was not raised upon the pleadings, and the judgment in that regard being outside of the issues, and apparently not litigated upon the trial, that part of the judgment appealed from should be reversed, with leave to both parties to amend or supplement the pleadings as they may be advised."

Instead of following the suggestion of this court in remanding the cause for further proceedings by way of amendments, or supplemental pleadings, the plaintiffs, in June,

1896, commenced another action, for the purpose of enjoining the defendant from constructing any flume or other conduit across the said lands of plaintiffs, or any portion thereof, and from diverting the waters from said stream to conduct the same across the lands of the plaintiffs.

The answer of the defendant, the Etiwanda Water Company, sets forth that in the year 1882 it had constructed an open flume, and by means of such flume and dam had diverted the waters of the creek; that said diversion had existed long prior to 1882, by defendant's grantors and predecessors in interest, and was not a new or original diversion by the defendant; that the flume had been constructed and used in lieu of an open ditch which many years before had been used by defendant's grantors and predecessors, and that the appropriation and use of the waters of the stream by the defendant and its grantors and predecessors in interest extended to and included the entire flow of the stream during the irrigation season of every year, and that the flume, as so constructed, was capable of carrying one hundred and twenty-five inches of water, measured under a four-inch pressure; that all the waters diverted by the defendant were actually used for a beneficial purpose during all said time.

After the commencement of this present action, F. W. Wood, one of the plaintiffs, died, and by order of the court Leona Wood, executrix of the will of F. W. Wood, deceased, was substituted in his place, and a supplemental complaint filed. In the answer to the supplemental complaint it is further alleged on behalf of the defendant that the use and substitution of the iron pipe for a portion of said flume was a temporary use and a temporary substitution only, and that the defendant never intended to abandon, and never did abandon, the right to maintain and use the said flume or any part thereof, as the same had been constructed and maintained and used by it, both prior and subsequent to the said temporary use of the iron pipe.

The court finds substantially that the said defendant, after constructing the flume in 1882, as stated, had used the same at all times openly and notoriously and under a claim of right, and adversely to the entire world; and continuously to the present time, and that in the month of June, 1892, it had

replaced about twelve hundred feet in length of said flume with an iron pipe of sufficient capacity to continuously carry said one hundred and twenty-five inches of water; that said iron pipe was constructed along the line of said flume, so replaced by it, and was used in connection with the remainder of said flume for the conduct of said water continuously until during the month of November, 1896, at which time said iron pipe was taken up by defendant and replaced with said flume in the former line thereof, and on the line of said pipe, and that it ever since has been used continuously for the conduct of said one hundred and twenty-five inches of water, precisely as the same was used before said iron pipe was used; that the use and substitution of said iron pipe for a portion of said flume was a temporary use and a temporary substitution only, and that defendant never intended to abandon, and never did abandon, the right to maintain and use said flume, nor any part thereof, as the same had been constructed, maintained, and used by it, both prior and subsequent to the said temporary use of said iron pipe.

Judgment was entered upon the said findings in favor of the defendant, from which judgment, and also from the order denying plaintiff's motion for a new trial, the appeal herein is taken.

In appellant's brief one of the points made is that the court erred in admitting in evidence the question of abandonment of the flume. It will be seen, however, that this court, on the former appeal, held that the question of defendant's right to reconstruct the flume could not be determined on the pleadings as they then stood, and for that reason the case was remanded for further proceedings, upon amended or supplemental pleadings, as the parties might be advised.

The very question involved in the present case, therefore, is, whether the defendant company had the right to restore the portion of the flume replaced by the iron pipe after being enjoined from using said iron pipe, and on this issue the pleadings in the present action properly present the case for decision, and the decision of the trial court, as already stated, is in favor of the defendant. The evidence, as well as the acts of the defendant, support the findings of the court that the defendant never abandoned the right to convey and use

the water, as had been its custom for some twenty years prior thereto.

The abandonment of an old or a dilapidated flume is altogether different from the abandonment of the right to divert and use water conveyed through such flume. The substantive right is the right of diversion and use of the water; the flume is a mere means of conveying the water. . . .

In *Utt v. Frey*, 106 Cal. 397, 39 Pac. 809, it is said: "The right which is acquired to the use of water by appropriation may be lost by abandonment. To abandon such right is to relinquish possession thereof without any present intention to repossess. To constitute such abandonment there must be a concurrence of act and intent, viz.: the act of leaving the premises or property vacant, so that it may be appropriated by the next comer, and the intention of not returning. (*Judson v. Malloy*, 40 Cal. 299; *Bell v. Bed Rock etc. Co.*, 36 Cal. 214; *Moon v. Rollins*, 36 Cal. 333, 95 Am. Dec. 181; *St. John v. Kidd*, 26 Cal. 272; *Richardson v. McNulty*, 24 Cal. 345; *Willson v. Cleaveland*, 30 Cal. 192.) The mere intention to abandon, if not coupled with yielding up possession or a cessation of user, is not sufficient; nor will the nonuser alone without an intention to abandon be held to amount to an abandonment. Abandonment is a question of fact to be determined by a jury or the court sitting as such." . . .

All the circumstances surrounding the case, as well as the direct evidence introduced, abundantly support the findings, and show that it was never the purpose or the intention on the part of the defendant corporation to abandon its right to the diversion and use of the water by means of the flume should the iron pipe not be permitted to remain.

The judgment and order are affirmed.

Loan of Water.

BOWMAN et al. v. VIRDIN et al.

(40 Colo. 247, 90 Pac. 506.)

MAXWELL, J.—Plaintiffs below, appellees here, by their complaint alleged that they were the owners of certain water rights in adjudicated priority No. 8 of the waters of Kannah creek, water district No. 42, Mesa county, Colorado; that defendants below, appellants here, were the owners of adjudicated priority No. 5 of the waters of said Kannah creek; that both of said priorities took their water from Kannah creek through the Brown & Campion ditch; that the headgates of the laterals of plaintiffs are above the headgates of the laterals of the defendants on the line of said Brown & Campion ditch; that pursuant to section 3, page 236, of the laws of 1899 (3 Mills' Ann. St. Rev. Supp. 2273c), and by a strict compliance with all the requirements of said sections, the owners of adjudicated priority No. 2 of the waters of Kannah creek loaned to the plaintiffs, for a limited time, thirty inches of water of said stream of adjudicated priority No. 2, to be used by the plaintiffs in saving their crops and orchards; that, for the purpose of utilizing the said thirty inches of water so loaned to them by the owners of adjudicated priority No. 2, the said water was taken out of the creek through the headgate of the Brown & Campion ditch down and through said ditch, and along, and by, and adjacent to the headgate and lateral through which the defendants divert water for irrigation of their lands; that defendants, well knowing the facts relating to the loan of the said thirty inches of water to plaintiffs, wrongfully, unlawfully, and forcibly, without the consent of the plaintiffs, took and diverted the said thirty inches of water into the laterals of said defendants, and used said water for the irrigation of their lands, and refused to close the headgate of their lateral, or allowed plaintiffs or anyone else to do so, thereby wrongfully, unlawfully and forcibly depriving plaintiffs of the use of said water, to the irreparable damage and injury of plaintiffs; and that defendants, unless restrained, threaten to and will continue so to do. A

perpetual injunction was prayed. Defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and, defendants electing to stand upon the demurrer, judgment was rendered, making the temporary injunction theretofore granted permanent. Error is assigned upon overruling the demurrer and entry of judgment.

It is the contention of appellants that section 3 of the act of 1899 (Sess. Laws 1899, p. 236; 3 Mills' Ann. St. Rev. Supp., sec. 2273c), is unconstitutional, as being in conflict with section 6, art. 16, Const. Colo. *Ft. Lyon Canal Co. v. Chew*, 33 Colo. 392, 81 Pac. 37, disposes of this contention adversely to appellants, by placing a construction upon the statutes in question which permits an exchange or loan of water under circumstances and conditions which do not injuriously affect the vested rights of other appropriators. At page 402 of 33 Colo., page 40 of 81 Pac., Mr. Justice Campbell said: "Sections 1 and 2 of the act prohibit the change in point of diversion until the party desiring to make the same has obtained an adjudication of the court that it can lawfully be accomplished without impairing the vested rights of others; that is to say, the right cannot be exercised at all until after a decree therefor has been obtained that vested rights are not impaired. Section 3 seems to recognize a temporary exchange or loan of water without first obtaining a decree. The right, however, in the latter case, if it exist at all, as we have already held, is just as much subject to the qualification that the vested rights of others are not to be impaired, as in the case of an attempted permanent change of the point of diversion; and, when it has been made, though it may be effected without first obtaining a decree therefor, it is incumbent upon the party asserting rights under the loan or exchange, when challenged by an action in court, affirmatively to show that it can be exercised without interfering with, or impairing, the vested rights of others." And, again, at page 404 of 33 Colo., page 40 of 81 Pac.: "If, as a matter of fact, these loans were made under conditions and in circumstances which permit of exchanges and loans of water it is only right and proper that the burden of establishing the same be put upon the parties thereto. That this is the rule that should prevail seems only

fair and just. . . . Such being the law of this state, when such exchanges or loans are made, or attempted to be made, they ought not to be permitted, if at all, until the parties seeking their benefits have clearly established that the alleged qualified right has been exercised in such a way, and at such times, and in such circumstances, that the vested rights of others are not injured."

There is no allegation in the complaint, nor any averment to supply the want of such allegation, to the effect that the alleged right of the owners of priority No. 2 to loan plaintiffs thirty inches of water of such priority, or that the alleged right of plaintiffs to borrow and use such water for the purpose set forth in the complaint, have been or can be exercised in such way as to not injuriously affect the vested rights of defendants in priority No. 5. Under the above authority the burden of establishing such facts resting upon plaintiffs, the complaint should make apt averments in that behalf.

The complaint being deficient in this regard, the court erred in overruling the demurrer of defendants, for which error the judgment must be reversed.

Reversed.

Riparian Owner—Subsequent Appropriator.

F. W. CONRAD et al., Respondents, v. THE ARROWHEAD HOT SPRINGS HOTEL COMPANY et al., Appellants.

(103 Cal. 399, 37 Pac. 386.)

SEARLS, C.—This action was brought to abate a private nuisance, and for a perpetual injunction against its continuance.

Plaintiffs had judgment granting them a perpetual injunction and for nominal damages. Defendants moved for a new trial, which was refused.

Two separate appeals are taken; one from the final judgment, and the other from the order denying a new trial. Both appeals are elucidated by the same transcript.

There is also a separate appeal in the same case (No. 19,193) from an order refusing to dissolve a preliminary injunction

issued in the cause, the result of which depends upon the decision of the other appeals, which will be considered together.

Plaintiffs are the owners of certain tracts of non-riparian lands in the county of San Bernardino, forming a part of a larger tract known as the "Orange Grove tract."

Defendant, the Arrowhead Hot Springs Hotel Company (a corporation), is, and it and its grantors have been since 1882, the owner in fee of a tract of land situate upon both sides of, and including the bed and banks of, East Twin creek, an un-navigable stream, which lands, the court finds, "are, and from time immemorial have been, riparian to said creek and its flow."

There are upon the lands of said defendant a large number of springs, hot, cold, and medicinal, and, also, what are designated as mud baths.

Defendant has upon said land, and for ten years prior to the commencement of this action had, a hotel thereon as a resort for invalids, with bath-houses, mud baths, etc., all of which are used for the entertainment of guests and treatment of invalids generally, whether suffering from rheumatic troubles, diseases of the blood, or other diseases. During all of said ten years defendant has discharged from his kitchen, bath-houses, hotel, privies, etc., the drainage and accumulation of filth and refuse matter therein accumulating, by means of sewers, pipes, etc., into certain ravines contiguous thereto, from and through which ravines it flows by natural channels into and down East Twin creek, and pollutes the waters thereof so that they are unfit for drinking or for any domestic purposes.

Plaintiffs have a ditch which diverts the water from East Twin creek about one-half mile below where defendant discharges its sewage into the stream, by which, and a pipe-line connected therewith, they conduct the water of said creek to their land for domestic purposes and for irrigating their land.

Plaintiffs aver, and the court finds, that they had been using, and had a right for one year before the commencement of this action to use, the water of the creek for irrigation and domestic purposes upon their land.

There is no allegation or finding as to the date of construction of the ditch through which plaintiffs take the water from

the creek, or the source or origin or character of their right thereto.

The evidence shows that in 1887 John Hancock conveyed the land now owned by plaintiffs to certain grantees, and in his deed of conveyance included "all the right, title, and interest of John Hancock, the party of the first part therein, in and to the waters of East Twin creek, and its tributaries acquired either by appropriation or otherwise, and then owned or held by him as riparian proprietor of the lands aforesaid, or otherwise. Also ditches held by him or to which he was entitled, and a right of way for said ditches and such pipe-line as the grantees desired to construct over a tract of land held by the grantor on East Twin creek as a timber culture claim," reserving to the grantor five inches of water to be taken from the ditch, which it recites was constructed in 1835, and is, say, one mile in length. Plaintiffs have constructed a pipe-line from the end of the ditch to their several lots of land for a distance of, say, one-half mile.

The ditch through which the water furnished to plaintiffs' land is diverted and conducted thereto taps East Twin creek, so far as can be determined from the record, about one mile above the "Orange Grove tract" of land. Defendants, in their answer, plead a prescriptive right to the use of East Twin creek, as a place of deposit for the refuse from their hotel, baths, etc.

There was evidence to show that until a period within four years next before July 19, 1892, the land of plaintiffs was wholly unoccupied and vacant, not settled upon or improved, and that the pipe system had not at the last-mentioned date been in use more than two years.

The court found against the prescriptive right of the defendants.

Judging from the record, and the conclusion is drawn that the rights of the plaintiffs are those of the ordinary locators who divert water for a useful purpose from a stream in this state. In other words, they are appropriators. The defendants, as riparian proprietors upon the same stream, have a right thereto prior in time, and as to the acts complained of are prior in user to any rights of plaintiffs. As against other

riparian owners below them on the same stream, defendants have no right to pollute the water to the material injury of the former.

Locators and appropriators of the waters of a stream have no rights antecedent to the date of their location. If others have, prior to their location, decreased the quantity of the water flowing in such stream, or caused a deterioration of its quality, the subsequent locator cannot complain.

Familiar examples of the application of this rule as between appropriators are of frequent occurrence in the mining regions of this state, where water is diverted from flowing streams upon which mining has destroyed the purity of the water. In such cases the appropriator takes the water with his eyes open—takes it as he finds it, and as to him the like continued deterioration is *damnum absque injuria*.

Drainage and the discharge of the sewage from the hotel of the defendants is shown by the evidence to have been necessary in the interest of sanitary conditions, and to have been for ten years accomplished by the only feasible plan of discharging into the ravines contiguous to and upon their own premises.

This was not, nor was its continuance as against subsequent locators and appropriators of the water of the stream, a wrongful act.

“Every person who constructs a drain or cesspool upon his own premises and uses it for his own purposes, is bound to keep the filth collected there from becoming a nuisance to his neighbors.” (Wood on Nuisances, 3d ed., sec. 1140.)

This doctrine is well settled, and applies as between parties who have equal rights to the enjoyment of their own property, and to be protected from injury arising from the undue use by their neighbors of their property.

In the case of appropriators of running water there is no mutuality of right, their titles or rights are not coextensive as to time, or equal in rank.

The second appropriator simply takes the residuum in quantity, subject to the changed conditions existing by reason of the prior user. If the water of East Twin creek was so contaminated by the acts of defendants as to be detrimental to

the public or to individuals living upon the stream below, a very different question would be presented.

But, as an individual who should collect the refuse from a slaughter-yard and haul it to his home would not be heard to complain that the odor constituted a nuisance, so the locators of this ditch, who have diverted the water of the stream to their homes a mile or more away, cannot be heard to complain that the water continues after their diversion, as it was before, noxious to the senses, and unfit for domestic use.

Two results follow from the position assumed:

1. The finding of the court that "the defendant corporation has not any right, and at the time this action was commenced had not acquired any right, to drain or sewer its said premises by conducting its sewage matter accumulating on said premises, from any source or cause, into East Twin creek," is contrary to the evidence.

2. The conclusions of law and the judgment are unsupported by the findings.

The judgment and the order denying a new trial, and each of them, should be reversed, and a new trial had.

Pueblo Rights—Appropriation—Injunction—Riparian Rights.

THE VERNON IRRIGATION COMPANY, Appellant, v.
THE CITY OF LOS ANGELES et al., Respondents.

(106 Cal. 237, 39 Pac. 762.)

THE COURT.—When this case was originally submitted for decision an opinion was prepared by Mr. Commissioner Temple, which is now adopted by the court:

"Plaintiff, a corporation, begins this suit, averring that it is the owner of a tract of land which is riparian to Los Angeles river, to enjoin defendants from diverting water.

“Plaintiff avers that the flow of water over its natural bed renders its lands fertile and valuable, and that it is entitled to have the waters flow as they have been accustomed to flow.

“That defendants claim an interest in the water adverse to plaintiff; that the claims of defendants Ames and James are wholly without right, and the claim of the city of Los Angeles is without right, except that the city has the right to divert and use a certain quantity, which it has been using, for municipal purposes and distributing to its inhabitants, which does not exceed three hundred inches, miner’s measurement. That the city claims not only the right to divert the water for said purposes, but to divert water to sell to the owners of nonriparian lands outside the city for profit, and is diverting large quantities of water, and is conducting it beyond the city limits and selling it to owners of nonriparian lands.

“That the city is preparing to enlarge its ditches so as to divert from the river all the water remaining therein, for the express and sole purposes of selling the same outside the city limits, and will do so unless restrained. That defendants Ames and James threaten to and will, unless restrained, divert from the stream all the water which the city permits to flow past the city. Plaintiff’s riparian lands are below the city and the lands of Ames and James.

“As a second cause of action it is shown that plaintiff is the owner of a water ditch and owns a water right, acquired by appropriation, to divert from Los Angeles river two thousand one hundred inches of water, the point of diversion being its said riparian lands.

“As in the first count, it is averred that defendants claim rights adverse to plaintiff, and threaten to, and unless restrained will, divert all the water of the river, thus depriving plaintiff of the water right it has acquired by appropriation.

“Therefore, plaintiff prays that: 1. Defendants be required to state the extent and nature of their claims; 2. That Ames and James be decreed to have no rights to any water, and be perpetually enjoined from diverting any; 3. That it be adjudged that the city has no right to any

water except for municipal uses and to distribute to its inhabitants; that the amount required for such uses be ascertained by the court, and the city be enjoined from diverting from the river any larger amount.

“The Los Angeles river flows from the north, through the city of Los Angeles, past the lands of Ames, which adjoin the city on the south, to plaintiff’s land, which adjoins Ames’ land.

“Ames answered, denying plaintiff’s rights and that he had interfered with any rights of plaintiff to the water, and, in substance, averring that the water in controversy is developed water, which he was not bound to permit to flow over his land to plaintiff, and also setting up a right to the water in himself acquired by appropriation.

“The city denies the rights of plaintiff and claims the right to take all the water of the river: 1. As successor to the pueblo of Los Angeles, which it contends owned all the water in the river; 2. As an appropriator of the water, claiming that it has been in the undisturbed and undisputed use of it, under claim of right, for fifty years.

“It is also contended that, under the laws of Mexico, the pueblo had the power to distribute the water for the benefit of all the lands then claimed by the pueblo, and that the city has succeeded to that right. That the outside lands to which it is conducting water were within the limits formerly claimed by the pueblo.

“The findings are quite voluminous, and include a finding to the effect that the city and its predecessor, the pueblo, have, since 1786, claimed the absolute ownership of all the waters usually flowing in the river as a supply for the city and pueblo and the inhabitants thereof for any and every purpose, and, under and by virtue of said claim, has during all said time continuously controlled the use, diversion, and disposition thereof; and has delivered the surplus not needed in the city to be used outside the city limits; and for more than thirty years the effect of such diversion has been to take all the water flowing in the stream from June until the fall rains, except in a few years of unusual rainfall.

“That the city is the absolute owner of all the water naturally flowing in the river, and holds the same for the use of its inhabitants, and for all other municipal purposes. The volume of water varies from year to year, and has sometimes been insufficient for such uses.

“The city contains at least sixty thousand inhabitants, and the population is rapidly increasing, as are also the necessities of the city and inhabitants for water.

“That bordering on the city, but without the municipal limits, is a large and valuable tract of suburban lands, containing a large population, with orchards, vineyards, and other plants, which use water for irrigation, and which from time immemorial have been supplied from the city water-works, which water is needed to keep the plants alive; that there is no other source from which water can be obtained for this territory, and if it cannot be supplied, the loss will be great and irreparable.

“It is also found that all the water of the river is necessary for the city and its inhabitants, and for the irrigation of the lands in the city and bordering thereon, and will probably be insufficient for use in the city in a short time, and ‘the same is not an unreasonably large supply for the city in the conditions now existing as aforesaid.’

“That although there has usually been some water in the dry seasons flowing past the city to plaintiff’s land, the city has always claimed the right to take it, and has taken it when desirable.

“That in 1889, 1890, and 1891, the city caused certain levees to be made, which raised to the surface water which theretofore had percolated through and under the sands composing the river-bed, and since that time the flow in the stream has increased. That in 1893 the city made preparations to divert this increased flow, intending to sell the same to parties outside the city limits, until required for the use of the city or the inhabitants thereof. That the amount required for such use varies daily, and cannot be exactly estimated.

“It is also found that plaintiff is a riparian owner, and has constructed a dam and a ditch for diverting water, as averred in the complaint, but has acquired no right to any

water by a compliance with the provisions of the Civil Code in regard to appropriation by the notice and record required, but has actually diverted some of the surplus water which the city permits to flow past when not required or desired by it. The greatest quantity which it has ever appropriated to any useful purpose is five hundred inches.

“Plaintiff’s point of diversion is, apparently, at or near the upper line of its riparian lands. No portion of the water which it proposes to divert from the stream is to be used on its own land. There is no evidence or finding that its lands are susceptible of cultivation, or can be made productive, or that plaintiff is or can be injured as to its riparian lands, though deprived of all the water flowing in the stream. Since, therefore, plaintiff’s riparian lands would not be injured by the divergence of the water at a point in the river above its lands, and especially since the injunction, if issued, would not have the effect to cause the water to flow over or along its riparian land as it was accustomed to flow, plaintiff is not entitled to an injunction to protect its riparian rights. (See *Modoc Land & Livestock Co. v. Booth*, 102 Cal. 151, 36 Pac. 431.)

“The actual diversion by plaintiff of five hundred inches of water was made while the city was actually diverting the stream as it had been doing for many years, claiming the right to take it all, and occasionally actually doing so. Again, it must be understood that the conditions discussed mainly apply to the dry season—from June until fall rains. At other times there is an abundance of water for all parties and for all purposes. Neither the evidence nor findings show when the plaintiff was able to take and sell five hundred inches of water. Was it during the dry season or when there was an abundance? Was it only when the defendants permitted the water to flow temporarily, while, for some reason, the water was not required? The needs of the city fluctuate daily. So, it seems, did the quantity flowing in the stream below the city. For how long a time plaintiff was able to sell five hundred inches of water is not shown. It does appear that sometimes larger quantities passed into its ditches. But that, of itself, does not constitute an appropriation. It was not appropriated to a useful purpose.

"This uncertain and, perhaps, permissive use of water is not sufficient to prove a right as against the defendants. But the plaintiff not only seeks an injunction, but asks to have its title quieted as against defendants, and its claim to the water, both as riparian owner and as an appropriator, determined. Counsel concede the claim of the city to the amount required and now actually used by the city, either for municipal purposes or for the inhabitants. This concession seems to be founded upon the idea that the city has acquired such right as it has by appropriation. Counsel, however, contend that the city has no power to appropriate water to sell to outside consumers for a profit, and that it has acquired no rights by these acts of its officers, which are wholly *ultra vires*. Unauthorized acts of its officers are not the acts of the municipality.

"As applied to this case, I am inclined to think this position must be sustained. It is not the ordinary case in which property has been acquired, by a corporation, through a transaction which was *ultra vires* as to the corporation. In such case it may be that the title of the corporation could only be called in question by the state. Here the title, if any, is gained through a continuous use which is forbidden, and the corporation cannot hold or use the property without the continued violation of its charter. It involves the continuous exercise of powers with which the corporation is not vested. It is not authorized to carry on the business of selling water to outside parties, and its officers are therefore not empowered to appropriate water for that purpose.

"But the city claims to have title to all the water derived from the Mexican pueblo, of which it is the successor. It becomes necessary, therefore, to examine the nature of the right which the pueblo had to the water of the river under the Spanish and Mexican laws.

"It is not easy for one accustomed to common-law terms and ideas, and particularly to the system adopted by the United States for the settlement of vacant territories, to comprehend the Spanish and Mexican systems, or to estimate properly the nature of the right which the Mexican pueblos had to their land and waters. The laws, ordinances, and regulations of Spain and Mexico frequently seem to

us at once oracular and vague. The trouble is, largely, that they were addressed to a people of very different habits of life and thought, and who were familiar with the system, of which they constituted a part. This system is strange to us; and we are thoroughly indoctrinated with the ideas arising from a very different system. The governmental modes differed so widely as to create in the people different necessities and habits of life. Some it may be interesting and profitable to notice.

"1. Our plan has been to encourage settlement of the country by selling land in small tracts, at a minimum price. When so settled, villages, cities, and towns have grown up as required to supply the wants of the settlers. They have been called into existence by the settlements, but, in the beginning, have not contributed much to cause the country to be settled.

"The Spanish system was the opposite. They founded or encouraged the formation of villages which, by affording protection as well as educational and religious privileges, would encourage settlement of the neighboring country.

"2. These pueblos differed from our municipalities in many respects. They had no charters, and seem always to have been subject to the control and supervision of superior officers, and this control seems to have been complete and constant. They could suspend, restrict, or enlarge the powers of the officers of the pueblo; and yet the pueblos, to an extent and in a mode which is strange to us, constituted convenient instrumentalities for the government of the neighboring country. Their jurisdiction, subject always to the supervision of higher officers, often extended over large territories. (*Hart v. Burnett*, 15 Cal. 531.)

"No grants of land were made to them, but as soon as organized they became entitled to have certain lands set apart to them for the use of the pueblo and its inhabitants. (*Stevenson v. Bennett*, 35 Cal. 432; *Brownsville v. Cavazos*, 100 U. S. 138, 25 L. ed. 574.)

"Our courts have determined that the successors of these pueblos held the pueblo lands in trust for the inhabitants, and that the legislature can control the execution of this trust; and the United States, in accordance with the deci-

sions, confirmed the lands to the successors of the pueblos. Whether, under the Mexican system, any title was vested in the pueblos, or the title remained in the nation with power in the *ayuntamientos* to administer the properties, is now immaterial. In either event, the mode adopted was a proper mode to preserve the equity which it is agreed the pueblos had in the lands set aside and devoted to the use of the pueblo.

“3. Perhaps the most important respect in which the pueblos and the habits of the inhabitants differed from our municipalities and the habits of our people, is found in the extent to which the individual wants were supplied from public or common lands. In this respect the difference is most startling. Our practice is to reduce everything to private ownership from which a profit can be made; and, of course, the more essential it is to the members of the community, the more profit can be made from it. The rule of the pueblo was almost the reverse of this. So far as communal ownership would answer the purposes of the community it was preferred. As water was one of the things thus held, we may understand better the nature of the right which the pueblos had to it by considering other properties so held.

“Many Spanish and Mexican documents were put in evidence on the trial of the case, and their substance is set out in the statement. The counsel for the city has also compiled a great deal of Spanish and Mexican law on the subject. I draw from these sources:

“1. There were the *montes*, or woodlands, from which the inhabitants could get firewood. A quotation is made from Alveres, volume 2, page 12: ‘In the law of Castile we meet many regulations concerning the woodlands and bounds (*terminos*) of cities and villas in addition to the very great utility which results from their preservation, since from them was to be drawn the timber necessary as well for the construction of ships as for firewood. With this object it is commanded that the trees shall not be cut from the foot, so that they may grow up again, and that the open fields shall serve for common pasture of the cattle. That in the bounds of villas and places shall be planted

woods and *pinones*, where there may be better pasturage and shelter for cattle, and supplies of wood and timber to them, and that the inhabitants may avail themselves of all.' They were common to all the inhabitants.

"2. The *dehesas*. This was a tract of land inclosed where all the laboring cattle of the neighborhood might be put.

"3. *Fuentes*. These were springs of water appropriated to the supply of the town.

"4. *Ejidos*. These were commons surrounding the town; in front of the gates; they were kept open; not cultivated. Here the people thrashed their grain or resorted for recreation.

"5. *Prados*—fields.

"6. *Pastos*—pastures.

"7. *Aguas*—waters.

"8. *Salinas*—salt springs.

"9. *Abreveduras*—places for watering cattle.

"*Valdios*—*terminos* not devoted to special use.

"All the inhabitants, under regulations designed to secure the utility of the lands and secure equality, could use all these lands.

"Then there were the lands devoted to churches and the *propios*. These were generally the lots fronting on the plaza, and were rented for stores, shops, etc. The rents were for the use of the pueblo. Among them were the *alhondijas*, a house set apart for strangers who came there to trade.

"I do not understand that these properties were commons in the common-law sense. They were communal property, subject to be administered by the pueblo authorities. The public could be dispossessed and the character of the lands changed. They might be sold or converted into *solares* or *suertes*, which could be reduced to private ownership. They were not dedicated to the public.

"Now, the waters of all rivers were, under the Spanish and Mexican rule, public property, to be administered and distributed for the use of the inhabitants. Apparently this was sometimes done by the pueblo authorities outside the pueblo lands. It must be remembered that towns and villages were greatly favored under the Mexican system; that

to establish them was the mode adopted for the settlement of the country. Contractors (*capitulantes*) were rewarded for organizing them. The ordinances of the king of Spain and the provisions of the government of Mexico in regard to them direct that they be located where water will be convenient. The organization of the pueblo of Los Angeles itself—to be hereafter referred to—will show the solicitude of the government in regard to this matter. Since the water belonged to the nation, and could not be acquired from it by condemnation, it would seem to follow, as a matter of necessity, that when the pueblo was organized under the laws, a sufficiency of this water for the pueblo was appropriated to it. The country was arid. The population was at first almost wholly agricultural, and we have seen, the waters were held by the pueblo, subject to the duty of distributing the same in the public interest.

“Nor do I think this was a mere political power which could be revoked at any time, so as to deprive the settlers who had been induced to become inhabitants of the pueblo of it. They had the same kind of right with reference to it which they had to the lands. Both were held as communal property, for the benefit of the inhabitants, and as an inducement to attract settlers.

“This view was adopted by this court in *Lux v. Haggin*, 69 Cal. 255. The question there was whether, under Mexican or Spanish law, the water of rivers was dedicated to the public in such sense that the people could not be deprived of the common use. It was said that pueblos acquired a species of property in the water of streams within their boundaries—a right which was inconsistent with such supposed dedication. They had title to such waters, subject to the public trust of continuously distributing the same in just proportion. After citing authorities in support of the proposition the court proceeds: ‘From the foregoing, it appears that the riparian proprietor could not appropriate water in such manner as should interfere with the common use of destiny which a pueblo on a stream should have given to the waters, and semble that the pueblos had preference of prior right to consume the waters, even as against the upper riparian proprietor. The common use, here spoken

of, is the use for the benefit of the community or the inhabitants of the pueblo.'

"This view, I think, finds support in the history of the pueblo of Los Angeles. In 1779 it was determined to found a pueblo called Reyna de Los Angeles, settling it with soldiers and families told off from garrisons; and the location was selected with a view to land and water for cultivation. In 1781 Don Phillipe de Neve, governor, issued a decree providing for the founding of the pueblo in the immediate vicinity of the river Porcuncula; all the land capable of irrigation should be carefully examined, and a point selected for the erection of a dam, which would insure the distribution of the water to the greater portion of the lands, and the site of the town should be as near the river as possible.

"When we remember that these pioneers were really farmers and stock-raisers, and the irrigation was a necessity, this order with the instructions is very significant.

"There is also an order made by Don Pedro Fages, governor of the peninsula of California, August 14, 1786, for the distribution of lands to the settlers of Los Angeles. It commissions the Ensign Don Jose Arguello to proceed to Los Angeles and give formal possession, directing him to clearly define what are public domains, viz., water, pasture, wood, etc.

"Arguello reported his compliance September 5, 1786, showing that he had confirmed to each settler his lot, and had measured the lands still unassigned and reserved to the crown, assigning them for the common use of the settlers for pasture, for keeping stock, with a common right in all the waters, wood, and timber.

"It also appears that in 1810 complaints were made to the commandante that the priests of San Fernando had diverted the water on the Cahuenga ranch to the injury of the pueblo. The controversy was settled, the priests acknowledging the superior right of the pueblo.

"Counsel have furnished me with translations of numerous ordinances, laws, rules, and regulations of Spain and Mexico relating to this subject. After perusing them I am satisfied with the conclusion reached in *Lux v. Haggin, supra*, that pueblos had a right to the water which had been appro-

priated to the use of the inhabitants similar to that which it had in the pueblo lands, and that the right of its successor, the city, to the water, for its inhabitants and for municipal purposes, is superior to the rights of plaintiff as a riparian owner.

“The question recurs, Has the city a right to take from the river more water than it requires for those purposes that it may sell such water to those outside the city limits? I think this question must be answered in the negative. It was so determined in *Feliz v. City of Los Angeles*, 58 Cal. 73, although it was also said in that case that the city had a right to all the waters of the river if required for municipal purposes or for the use of the inhabitants.

“I quote: ‘It was conceded on the argument that the city had appropriated a portion of the waters of the Los Angeles river before plaintiff constructed ditches, and that the use by the city to the extent of such appropriation could not be interfered with by any subsequent appropriation; but it was contended that the rights of the city were limited to the amount appropriated at the time plaintiffs or their grantors built their ditch. Such a construction of the defendants’ right would not be in harmony with the facts found by the court. From the very foundations of the pueblo, in 1781, the right to all the waters of the river was claimed by the pueblo, and that right was recognized by all the owners of land on the stream, from its source, and under a recognition and acknowledgment of such right plaintiff’s grantors dug their ditch. . . . The city, under various acts of the legislature, has succeeded to all the rights of the former pueblo. . . . From the fifth finding it appears that when the acts complained of were done by the officers and agents of the defendants, all of the waters of the Los Angeles river were required and were not sufficient to supply the wants of the city, and we are of the opinion that it was the right of the municipal authorities to prevent any diversion of said waters at the time by the plaintiffs.

“‘We do not intend to be understood as holding, nor do we hold, that the city has the right at any time to dispose of the waters for use upon land situated without the city limits.

On the contrary, we are of the opinion that the city has not that right.'

"That opinion was based on the judgment-roll, which contained findings which showed the nature of the claim of the pueblo. A reference will show that as to such facts the findings accord with those stated in this opinion. The case is therefore direct authority upon the proposition here involved. It is in entire accord with *Lux v. Haggin*, *supra*, and with the views herein expressed. Indeed, so far as this particular question is concerned, it would be difficult to reach any other conclusion. The waters of the rivers belonged to the nation—was held by it for the use of the inhabitants. It retained the power to distribute and to redistribute it as the interests of the community required. While, therefore, pueblos had a preferred right to the water, it must be understood that such right could be asserted only to the amount needed to supply the wants of the inhabitants.

"The city, however, and its predecessors, the pueblo, has, from a time antedating the change of flags, continuously taken from the river more water than was required for municipal uses and for the inhabitants and has supplied the same extra-municipal territory with water. Relying upon it, orchards, vines, and other plants have been set out, and the country has become valuable and thickly populated. Has the city by such use acquired a right to do so?

"This question must also be answered in the negative. Whatever may have been the case once, the city for many years has certainly had no right under its charter to sell water to outside parties for use on extra-municipal lands. When the municipal officers do this they exceed their authority, and their act is not that of the city. Under our system the exercise of such powers for a great length of time will raise no presumption of a grant to the city of such powers. Its powers are derived from its charter and from public laws, of which courts take judicial notice.

"Nor can the city in this action assert any right in the inhabitants of the extra-municipal district to the water. Waiving other difficulties which would arise if we could suppose that such right existed, it does not appear that the

same lands or the same individuals have been continuously supplied. It is the territory or community which has been so supplied. If such right existed in the community or in individuals, it could be asserted against the city. But they have taken the water by purchase from the city, thereby showing that the use has not been under a claim of right on their part. Indeed, the city now not only claims the right to entirely deprive them of the water, but asserts that it will soon do so.

"I cannot see that the city has acquired any further rights to water through the various acts of the legislature referred to.

"The act of 1850 (Stats. 1850, p. 155) incorporated the city, limited it to four square miles, and provided that it should succeed to the property rights and powers of the pueblo.

"The act of 1851 (Stats. 1851, p. 329) authorized the city to sell or lease its lands, and to take water from the river to irrigate the land outside the city, but provided that it should exercise no municipal authority over such lands.

"In 1854 an act was passed construing the act of 1850 as vesting in the mayor and common council power and control over the distribution of water for the purpose of irrigating vineyards and lands within the limits claimed by the pueblo.

"In 1874 an act was passed (Stats. 1874, p. 633) granting to the city the absolute ownership of the waters of the river.

"In April, 1876, the charter of the city was revised (Stats. 1875-76, p. 693), and the power of the council to distribute the waters of the river was limited to the city. In all subsequent revisions or amendments to the charter the power of the municipal officers over water is similarly limited.

"It will hardly be claimed that the legislature could grant to the city the water of the river so as to deprive riparian owners of it. It may be claimed, however, that the act of 1854 enlarged the corporate powers of the municipality, and that thereafter the water was lawfully distributed and sold to be used on extra-municipal lands. Granting that this was so, the only title that the city could thus acquire would be by appropriation. The right of an appropriator may be lost by abandonment, and the subsequent acts restricting the power

of the city to distribute the water to the inhabitants and lands of the city amounted to such abandonment. At present the city has no power to take and distribute the water to such extra-municipal lands.

“It is also asserted on the part of the city that the increased water which it proposes to take is developed water to which plaintiff can assert no right. It appears that artificial banks have confined the waters to a narrower channel, and it is inferred from the fact that since that time more water has been running in the stream below the city than this developed or made artificial water. But, admitting that such inference can be made, this would be to save water, not to develop it.

“As plaintiff is not entitled to an injunction, it is not necessary to determine whether the court could ascertain the amount of water needed by the city and limit the right to such necessity. If this could be done at all, it is evident that it would be in a very liberal spirit. The wants of a city naturally fluctuate, and on an emergency may be greatly increased beyond ordinary wants. A court would hardly say that where it can a city may provide for such emergencies, even though they are very unlikely to occur. This trouble does not exist, however, when it is confessed, as here, that the motive of enlarging the ditches to take more water is for the purpose of selling it to irrigate outside lands. From what has been said it would seem to follow that the city cannot do that.

“The city was allowed, over the objection of plaintiff, to prove that it was a matter of common reputation, more than thirty years ago, that Los Angeles claimed the water and had the control of it. It is contended that the city could not thus prove that it had title to the water; that the claim of the city is based either upon appropriation, which must be shown by acts, or upon the usages and laws of Spain and Mexico, of which the courts take judicial notice, and which are not matters of proof. The effect of these upon the right of the city to the water must be determined by the court, and cannot be shown by the opinion of witnesses or of the general public.

“Admitting appellant’s position here, it is difficult to discover how it has been injured, but I do not understand such to have been the purpose of the evidence. It was proposed to show that the city had used the water under a claim of right. It was proper to show this, and, as it was a matter of general interest, and, as to a portion of the time, of ancient date, and the declarants dead, it could be established by proof of the prevailing current of assertion. (1 Greenleaf on Evidence, 128.)

“We come now to the case of defendant Ames. Ames owns forty acres of riparian land immediately below the city and immediately above the riparian lands of the plaintiff. He had erected a dam in the river just above his line on the lands of the city, but with the consent of the city, and proposes to divert six hundred inches of water, miner’s measures, for the purpose of selling the same to nonriparian owners, using none on his own land.

“It was adjudged that neither Ames nor the plaintiff had any right to any of the waters of the river which they could assert against the city, but when the city permits any water to flow past, if it be all developed or artificial water, Ames may take it all. When it is mingled with the natural flow in the stream it must be regarded as though it were the natural flow. Then, when there is only sufficient water to supply the uses required for the riparian lands of plaintiff and defendant Ames, plaintiff may have one-fifth of such water and Ames four-fifths. When there is more than is required for such needs Ames may first take one hundred inches, and Ames may then take the remainder, if any there be, and both plaintiff and Ames are perpetually enjoined from taking any water from the stream except as permitted in the decree.

“This decree is not supported by the facts found or by any facts which could have been found from the evidence, and is inconsistent with the law applicable to such cases.

“As we have seen, there is no evidence which tends to show that there is any developed or artificial water in the stream.

“The next disposition professes to protect the riparian rights of the parties, but is utterly inconsistent with such rights. Under that doctrine Ames would not be entitled as

against plaintiff to four-fifths of the water, nor to any other quantity, except when it was required for certain uses, nor would he then be permitted to take more than such uses required, and possibly not even that much.

“And then, how, consistently with the doctrine of riparian rights, could Ames take one hundred inches of water not required on his riparian lands, or the further indefinite quantity, after plaintiff has been allowed to take two thousand inches? What right, under the findings or evidence, has plaintiff made out to two thousand inches of water under any circumstances?

“This shows a very loose idea of the doctrine of riparian rights. If that doctrine be the true one, as this court has repeatedly held, the riparian owner is entitled to the continuous flow of the stream as part and parcel of his estate, and not as an easement or incorporeal right issuing out of land. He does not own the *corpus* of the water, but incident to his riparian right is the right to appropriate a certain portion of it. It is only, I think, by some species of appropriation that one can ever be said to have title to the *corpus* of the water. The right of the riparian owner is to the continuous flow with a usufructuary right to the water, provided he returns it to the stream above his lower boundary, and the right, as I have said, to make a complete appropriation of some of it. But, as our decisions stand, an appropriator cannot acquire a right to any of the waters of a stream to the prejudice of a riparian owner, by any use, except under the statute of limitations.

“I think some material findings are not sustained by the evidence, and that the judgment is not justified by the findings, and recommend that the judgment and order be reversed and a new trial had.”

For the reasons given in the foregoing opinion the judgment and order are reversed and a new trial granted.

to be
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**Riparian Ownership—Appropriation on Private Land—
Prescription.**

50/119
BEN W. CAVE et al., Respondents, v. GEORGE W. TYLER
et al., Defendants. HANNAH S. SKINNER, Appel-
lant.

(133 Cal. 566, 65 Pac. 1089.)

McFARLAND, J.—This is an action to quiet plaintiff's title to the right to the use, and a diversion through a ditch called the Mill creek zanje, of all the water of a natural stream called Mill creek and its tributaries. Judgment went for plaintiffs, and defendant Hannah S. Skinner appeals from an order denying her a motion for a new trial.

Under our views of the case, it is not necessary to examine all of the questions presented, and the facts essential to the point of the decision may be briefly stated.

Mountain Home creek is a tributary of Mill creek, and Snow creek is a tributary of Mountain Home creek. Appellant owns land through which the two latter streams run, and which is riparian to the same. She acquired her right to this land in 1871 from the Southern Pacific Railroad Company, who acquired it in the same year from the United States government. Since 1888 she has used about fifteen inches of water from Mountain Home creek, and about two inches from Snow creek, for the necessary irrigation of her land—upon which she grows trees, vines, and vegetables—and for domestic purposes; and this was not an unreasonable amount of water, as the court finds, for such purposes. At this point the land through which these streams run was part of the public domain of the United States. On Mill creek, about five miles below appellant's land, the respondents and their predecessors have, by means of said Mill creek zanje, continuously, since about the year 1853, diverted all the water flowing in said Mill creek for irrigation and other purposes, and their diversion of the water has been open, notorious, and under a claim of right. They claim that by reason of such diversion they have the right to prevent appellant from using any of the water of the tributaries for her purposes as above stated, and the court so decreed.

The respondents do not claim any rights as riparian proprietors. It is not found that they own any land whatever on Mill creek. They claim solely as appropriators. Of course, under the general law, they acquired no rights by prescription, as against appellant or her predecessors, who were upper riparian proprietors; for a diversion of the water after it had passed her land, which did not in any way interfere with its natural flow over her land, was not an invasion of her right which she was called upon to notice. (*Hargrave v. Cook*, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442.)

It is contended, however, that the right of respondents to continue to divert all of the water, and to prevent appellant from using any of it as a riparian owner, is guaranteed to them by section 9 of the act of Congress of July 26, 1866 (14 U. S. Stats. at Large, p. 253), and section 17 of the act amendatory thereof, passed July 9, 1870 (16 U. S. Stats. at Large, p. 218). We do not think that this contention can be maintained.

There is no finding that the diversion was made on the public domain of the United States. There are some things in the record which seem to indicate that the diversion was on private land acquired under a Mexican grant, in which the government never had any estate or interest; but there is no finding on the subject. The burden of showing that the diversion was made on the public domain was upon respondents, if that fact was essential to respondents' asserted right under said laws of Congress, as we think it was. In *City of Santa Cruz v. Enright*, 95 Cal. 105, 30 Pac. 197, the defendant claimed as an appropriator of water, and the court said: "It is claimed that the court erred in instructing the jury that the defendant could not acquire any right in the waters of the creek by mere appropriation. This contention cannot be sustained. (*Alta Land Co. v. Hancock*, 85 Cal. 222, 20 Am. St. Rep. 217, 24 Pac. 645.) It does not appear whether the lands through which the stream ran at the time defendant claims to have acquired his right of appropriation were private or public property. If they were public lands of the United States at that time, we think it devolved upon the defendant to show that fact." In the case at bar, therefore,

the respondents are not in the position of the one who has invaded the public domain, and attempted to acquire any possessory rights thereon.

Section 9 of the act of 1866 merely provides "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other useful purposes have vested and accrued and the same are recognized and acknowledged by the local customs, laws, and decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same"; and section 17 of the act of 1870 merely provides that "all patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights . . . as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory." It is clear that these provisions refer only to the interest of those who have gone upon the public domain and done acts of ownership there which the government, as proprietor, could have prevented, but in which it acquiesced. For a long period the general government stood silently by and allowed its citizens to occupy a great part of its public domain in California, and to locate and hold mining claims, water rights, etc., according to such rules as could be made applicable to the peculiar situation; and when there were contests between hostile claimants, the courts were compelled to decide them without reference to the ownership of the government, as it was not urged or presented. In this way—from 1849 to 1866—a system had grown up under which the rights of locators on the public domain, as between themselves, were determined, which left out of view the paramount title of the government. The acts of 1866 and 1870 were intended merely to expressly recognize and ratify this system. Where they speak of "vested and accrued" rights, they mean, of course, vested and accrued as between the locators; for mere general locators have no vested right as against the government. The government could have ousted these locators by legal proceedings, or, perhaps, by the direct exercise of sovereign force; but it did not do so; it acquiesced in their possession. And by the congressional acts above noted the government merely said that whenever it had acquiesced in asserted possessory rights on

the public domain, which were upheld by local customs and laws and decisions of the courts as between the possessors themselves, it would treat those possessors as though they had acquired prescriptive rights against the government, and would recognize such rights whenever afterward granting patents to any part of its land. When a person went upon the public domain and there diverted the water of a stream running thereon, he invaded the rights of the government to its own land, and the government could either resist the invasion or acquiesce in it. If it adopted the latter course, then the kind of vested and accrued right grew up which the government by said acts of Congress promised to protect. But when a party on private land, to which the government has no title, diverts water from a stream, what vested right does he acquire in the water in the upper part of the stream, where it flows through the government land? Such diversion does not interfere in any way with the flow of the stream in the land of the upper proprietor; it does him no injury; it is no invasion of his right; it gives him no cause of action; it leaves no field for the play of consent or acquiescence; it never ripens into title by prescription. Under what local custom or law, under what "decisions of the courts," was there "a vested and accrued" right of respondents to all the water of the stream, up through the public domain to its head, thus depriving a large section of country above of its source of fertility? We know of none. In all the cases to which we have been referred the diversion was upon the public domain. It may be well to say—although the case is not referred to in the briefs—that there is nothing in *Healy v. Woodruff*, 97 Cal. 464, 32 Pac. 528, at all conflicting with the views above expressed. It was merely held there that the plaintiff was not prevented from enlarging his ditch by the fact that since its original construction he had obtained title from the government to "a piece of land through a small portion of which the said Cedar creek (the stream diverted) runs." There was no contention that the diversion and ditch were not on the public domain.

Under the above view it is not necessary to notice other points made by appellant. What the rights of the respondents would have been if it had been shown that the diversion

had been made on the public domain, and acquiesced in by the government, need not here be considered.

The order appealed from is reversed and a new trial ordered.

Riparian Rights—Effect of Nonuser—Rights of Prior Appropriator—Easement.

E. T. HARGRAVE et al., Appellants, v. D. C. COOK et al., Respondents.

(108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390.)

HENSHAW, J.—Appeal from an order granting a new trial.

Plaintiffs claim ownership in common with some of the named defendants in a certain described ditch, flume, water right, and right of way, by means of which they diverted the waters of Piru river to their nonriparian lands. The ditch was known as the Hargrave & Comfort ditch. They averred the adverse claims of defendants and asked for a decree settling their rights and enjoining defendants from further assertion of such or any claims.

The defendants answered in accordance with their various claims; some asserting ownership in the ditch and water rights, others declaring upon superior rights by prescription. But, in particular, the defendant Cook claimed the rights of a riparian owner to the water of the creek, which rights are pleaded as superior to those of the ditch owners.

Stripped of matters unnecessary to this consideration the following are the essential facts: Defendant Cook is the owner of the Temescal rancho under United States patent issued in 1871. Piru river flows through this ranch, and thence across the northwest quarter of section 20. About the year 1875, section 20 being public land of the United States, plaintiffs' predecessors in interest constructed the ditch and diverted part of the waters of the river with the acquiescence of the then occupant of the land; and, as the court found, plaintiffs and their grantors, "for more than fourteen years

next preceding the commencement of this suit, have been in quiet, peaceable, open, adverse, notorious, uninterrupted, and exclusive possession, claiming right and title of said water ditch, with the right to divert and use the waters of said Piru river to the extent of two hundred and seventy-one inches, measured under four-inch pressure."

The court further found that the predecessors in interest of the defendant Cook, in the Temescal rancho, did not use any of the waters of said stream, except at rare and irregular intervals, and in small quantities, and that they at all times knew that the said Hargrave & Comfort ditch was being continuously used, and that the waters of the stream were being diverted and conducted to lands not riparian to the stream, and that such use, "with their full knowledge and acquiescence," had been continuous for a period exceeding ten years before Cook acquired title to the Temescal rancho and the northwest quarter of section 20. Also, it is found that when Cook acquired title he knew of the use of the water by defendants, and "did not object to such use, but fully acquiesced therein until about the commencement of this suit, and that the rights of plaintiffs were not disputed until long after they had fully acquired a prescriptive right with their co-owners to a part of the waters of the said stream."

The waters of Piru river had in the past been little used by the owners of the Temescal rancho, but, upon Cook's acquisition of it, he began the planting of extensive orchards of fruit-bearing trees until, as he pleads, there were at the commencement of the suit over two millions of orchard and nursery trees dependent upon the waters of the Piru river for irrigation. This use of the water by Cook naturally lessened the flow of the stream to plaintiffs' ditch, decreased the supply available for their purposes, and led to this action.

The Piru Water Company, another of the defendants, took water from the Piru river by means of a ditch higher up the stream than the ditch of plaintiffs. Its ditch at the time of the action tapped the river upon the land of the Temescal rancho and carried the water over and across it to other nonriparian lands. Its right by prescription was claimed to be prior and superior to the right of the owners of the Har-

grave & Comfort ditch, and this seems to have been conceded, though the precise extent of the right is a matter of controversy which will be considered hereafter.

The court by its judgment and decree awarded: 1. The right to Cook to use the waters flowing over the Temescal rancho for domestic purposes and the watering of stock; 2. The right to Cook to a hundred inches of water, under four-inch pressure, drawn off in Esperanza ditch; 3. The right to the Piru Water Company to an amount not in excess of two hundred and eighty-five inches, or so much thereof as may be necessary for the uses accustomed to be made upon certain nonriparian lands; 4. The right to the owners of the Hargrave & Comfort ditch to an amount not in excess of two hundred and seventy-one inches, or so much thereof as may be necessary for the uses accustomed to be made, and in accordance with the amounts by the owners respectively accustomed to be used upon certain described nonriparian lands; and 5. The right to Cook, "after the wants and necessities of the above prior owners have been fully and reasonably supplied," to use the surplus waters for irrigation on the lands of his ranch.

By this decree the right of an upper riparian owner to the use of the water for irrigating purposes is made subordinate to the right of a lower appropriator, because at the time the right of appropriation vested the riparian owner was not actually using the water for the designated purpose.

This view, appellants contend, is sound. It is the view taken by the court, upon trial, and expressed by the judge in the following language: "I think the law is well settled in this state that a person diverting and appropriating to a useful purpose the waters of a running stream may acquire an ownership in the right to the use of such waters, to the amount he has appropriated to such useful purpose, by operation of the statute of limitation, even against an upper riparian owner, although the point of diversion is without the limits of the lands of such riparian owner, except as against any lawful use to which the riparian owner had or was making of the waters during the time of the creation of the right in the appropriator by operation of statute of limitations."

Upon the hearing of the motion for a new trial the court receded from this position, after the consideration of authorities not before called to his attention, and ordered a new trial. Other grounds were urged in support of the motion. Such of them as are deemed necessary will receive attention, but the principal point inviting consideration is the one above set forth.

The right of a riparian proprietor in or to the waters of a stream flowing through or along his land is not the right of ownership in or to those waters, but is a usufructuary right—a right, amongst others, to make a reasonable use of a reasonable quantity for irrigation, returning the surplus to the natural channel, that it may flow on in the accustomed mode to lands below. If his needs do not prompt him to make any use of them, he still has the right to have them flow onto, and along, and over his land in their usual way, excepting as the accustomed flow may be changed by the act of God, or as the amount of it may be decreased by the reasonable use of upper owners and riparian proprietors. But none of his rights to put the water to legitimate uses is lost by mere nonuser. His rights are not easements nor appurtenances to his holding. They are not the rights acquired by appropriation or by prescriptive use. They are attached to the soil and pass with it (*Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674), and may be lost only by grant, condemnation, or prescription.

With any use or diversion of the water after it has passed his land the upper riparian proprietor, having no ownership in and no longer any rights to it, would have no concern. (The right to forbid the lower owner from backing the water and flooding his land not being here under consideration.) None of his rights would or could be impaired thereby, and without such an impairment he would be without injury, and, consequently, without cause for complaint or redress. "His right extends no further than the boundary of his own estate. He cannot complain of the mere facts of the diversion of the watercourse either above or below him, if, within the limits of his own property, it is allowed to follow its accustomed channel." (*Lux v. Haggin*, *supra*.)

The rancho Temescal was never public land within the meaning of the United States statutes affecting appropriations of water. The riparian rights of the owners of private land are fully protected by section 1422 of the Civil Code.

One who bases his right solely upon appropriation made of waters flowing over land which at the time of the appropriation was a part of the public domain acquires thereby no right superior to or in derogation of those attaching to lands riparian to the same stream which at the time of the appropriation were held in private ownership. . . .

No estoppel is pleaded or found, nor would the facts warrant such finding.

The motion for a new trial was properly granted upon the ground considered.

In contemplation of the new trial it is proper to say that the rights of defendant Cook and of defendant, the Piru Water Company, of which Cook is a stockholder, are in issue in this action only to the extent that their rights affect or are affected by the rights of plaintiffs. As between themselves, their rights are not subject here to determination, excepting so far as may be necessary to do complete justice to plaintiffs, and excepting so far as between themselves they have tendered and joined hostile issues. The limitation upon the use of water appropriated by the Piru Water Company is not warranted by the evidence. So far as the plaintiffs are concerned, the Piru Water Company is prior in time and superior in location, and had acquired the ownership of a given amount of water while the water was used for proper objects, with the right to change the place and purpose of use so long as the change did not injuriously affect the rights of the subsequent appropriators and claimants. ✓

Upon the question of the right of the owners of the Hargrave & Comfort ditch to extend it five or six hundred feet over the northwest quarter of section 20, now the land of Cook, the better to facilitate the obtaining of their water, we do not deem it proper, upon this appeal, to do more than point out that while an appropriator of water upon government land retains his rights when the land passes into private ownership, by virtue of the confirmatory statutes of the United States (14 U. S. Stats. at Large, 253; 16 U. S. Stats.

at Large, 218), and, while in the exercise of these rights, he may change the point of diversion to another place upon servient tenement, he is nevertheless limited in so doing to the exigencies of the situation, and has no right to make such change arbitrarily and at will. He may do so when, under certain circumstances, it is required to enable him to take the amount of water to which he has ownership, but then only when "others are not injured by the change." (Civ. Code, sec. 1412.) His rights are the rights of the grantee of an easement, and extend, in the matter of changing the point of diversion, no further than the boundaries of the servient tenement, and even when entering upon this he is under obligation only to make reasonable changes with reasonable care, and also to repair, so far as possible, whatever damage his labors may have occasioned (Gale & Whately on Easements, 235); as to lands other than those subject to his easements, and as to other claimants and owners, he can make no change at all which injuriously affects them or their rights.

The order appealed from is affirmed.

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Riparian Rights—Prior Appropriation—Lower Subsequent Appropriation.

EDWIN SENIOR et al., Appellants, v. J. C. ANDERSON et al., Respondents.

(130 Cal. 290, 62 Pac. 563.)

THE COURT.—Action to quiet title to a water right. Findings and judgment were for the defendants, and plaintiffs appeal from the judgment and from an order denying a new trial, and also from an order after judgment relating to costs.

A former judgment in this case in favor of the defendants was reversed upon plaintiffs' appeal, and a new trial granted. The second trial was had upon the same pleadings and the issues are therefore unchanged.

For a statement of the case and the issues involved, see the opinion of this court upon the former appeal, reported under the same title, in 115 Cal. 496, 47 Pac. 454. The principal question of fact was then, and is now, the extent or quantity of the Hines appropriation. Upon the former appeal it was held that the quantity appropriated by Hines was so much of the water of the stream as was reasonably necessary for the use of the Hines tract of land and at the time the action was commenced. The quantity of land then irrigated was not materially different from that now irrigated. The quantity of water then diverted through the Hines ditch and that now diverted, so far as the evidence shows, is the same, namely, seventy-seven and seventy-eight one-hundredths inches, measured under a four-inch pressure. Upon the former appeal, this court concluded, from the evidence, that more water was diverted upon the Hines ranch than was required or used for any useful purpose thereon. The evidence upon the second trial shows that there are now irrigated upon the Hines tract about forty acres in fruit trees, no alfalfa, and ten or twelve acres of wild or uncultivated grass land used for pasturage, and, as before, one hundred and eighty to two hundred acres of nonriparian lands, outside of the Hines tract, upon which citrus fruits are cultivated.

Upon the second trial, there was evidence tending to show that there were other portions of the Hines tract that were capable of irrigation from the Hines ditch, but under the decision upon the former appeal that fact does not affect Senior's appropriation, which is to be determined by the quantity of water reasonably required for the irrigation of the lands then irrigated upon the Hines tract, omitting, perhaps, the pasture land, which Mr. W. L. Hall testified he did not now irrigate because he did not have sufficient water, and had not for two years. Several witnesses testified that the whole of the water was necessary for use upon the Hines tract, and the court so found, though it further found that "While the amount of seventy-seven and seventy-eight one-hundredths inches, measured under a four-inch pressure, would be more than was necessary for the irrigation of the Hines tract, if the same flowed continuously, yet no such quantity of water continues to flow during any considerable portion of the irri-

gation season, and it is necessary to make use of all the water that would flow in said conduits of the defendants, while the same continues to flow, to keep the lands in such condition as that the quantity of water usually flowing in the stream later in the season would suffice for the proper irrigation thereof, and the said amount flowing in said stream during the irrigating season is, in many years, insufficient in quantity for the proper supply of said lands."

Many witnesses were examined and testified to the effect that the flow of water in the stream greatly diminished during the irrigating season, but no effort seems to have been made to ascertain by measurement the average flow of the water in different months of the season, nor the quantity in fact used upon the Hines ranch, nor upon the outside lands, nor whether the water was used upon the Hines land by continuous flow, or alternately, by time division, with the outside lands. It does appear, however, that the water system of the outside lands had a capacity of thirty inches, and said lands were entitled to five-eighths of the water, and the Hines place to three-eighths; and, in the absence of specific evidence to the contrary, we must assume that the water was in fact used substantially in those proportions. Of course, it is immaterial to the plaintiffs where the water legally appropriated by Hines was used, but the quantity of land irrigated from that source furnishes evidence tending to show whether the quantity of water diverted from the stream through the Hines ditch was more than was reasonably necessary for beneficial uses upon the Hines land, since that was the measure of the extent of his appropriation. Plaintiffs also introduced several witnesses who had experience in the irrigation of fruit lands in that vicinity, who testified to the quantity of land that could, in their judgment, be irrigated with one inch of water flowing perpetually, and these ranged from two acres of fruit land to seven or eight acres to each inch of water, and among the witnesses who so testified were four of the defendants. This wide variance as to the quantity per acre is based partly upon the character of the soil, and partly upon the age of the trees, and the manner of using the water. This evidence tends strongly to sustain the contention of the plaintiff, and supported as it is by the fact

that five-eighths of the water is used upon one hundred and eighty acres of other lands, while the remainder sustains the trees growing upon the Hines ranch without injury, so far as disclosed by the evidence, and by the further fact that for two years or more what was supposed to be about one-tenth of the water diverted by both ditches was used upon plaintiffs' land, would appear to greatly preponderate over the general expression of an opinion that the entire flow during the irrigating season was not more than sufficient for the proper irrigation of the Hines land upon which water had been at any time used.

There was some testimony, however, of a different character and furnishing a different basis of calculation.

W. L. Hall, one of the defendants, and also one of the owners of the Hines ranch and having the charge of it for himself and his co-owner, was asked by his counsel the following question: "When you say it would require forty inches to the acre to irrigate it during the year, do you mean by that that it would take forty inches of, say, twelve thousand five hundred or thirteen thousand gallons, or whatever an inch of water is, forty times that amount per acre during the year? Is that what you mean when you say forty inches to the acre? A. Forty times thirteen thousand gallons, that is what I mean; and, dividing it up during the season, one-fifth of that would be eight inches to the irrigation. And that amount placed on the ground is what I term forty inches during the season."

Assuming that the witness correctly states the number of gallons required to put one inch of water upon an acre of ground, the number of inches measured under a four-inch pressure required to put that quantity of water upon an acre of land is not difficult of computation. According to the "Statistician and Economist" for 1899-1900, page 549, one miner's inch (four-inch pressure) will discharge in twenty-four hours 2,260.8 cubic feet, or 16,956 gallons. Deducting thirty-eight per cent for the difference between the theoretical and the actual flow (6,413 gallons), we have 10,513 gallons actual flow in twenty-four hours, or, for ten days, 105,130 gallons, while each irrigation of eight inches on defendants' basis would require eight times 13,000 or 104,000 gallons. If, ✓

therefore, we further assume that fifty acres are irrigated on the Hines ranch, fifty inches constant flow would put the required amount of water on each acre every ten days; or a constant flow of seventeen inches would put said required amount of water on said fifty acres every month.

Here is a mathematical demonstration based upon the testimony of defendant Hall, who, with his co-owner of the Hines ranch and of the water right, conveyed that water right to the corporation, and through it to his codefendants; and it may be added that this conclusion is supported more or less directly by the testimony of all the witnesses who base their testimony upon their experience and observation of the quantity of fruit land that may be irrigated per inch of water; and the fact that for seven or eight years before the second trial of this case from one hundred and eighty to two hundred acres of fruit land, outside of the Hines land, had been irrigated almost entirely from the Hines ditch closely approaches a demonstration that the capacity of the Hines ditch, and the water diverted thereby, was largely in excess of the requirements of the Hines ranch.

As to the quantity of water flowing in the stream during the irrigating season, Mr. Hall testified: "About sixty inches on an average flows down that creek to our point of diversion, I would suppose, in the first part of the year, and diminishes rapidly until along in August I have hardly ever found more than thirty inches; last year there was about twenty inches in October. The lowest stage of water, I think, was sixteen inches. In the first of July last year there was thirty-five or forty inches. That amount, I think, would not be any more than sufficient to irrigate the cultivated lands on the Hines place."

These quantities are estimated by the witness; but, assuming they are correct, and testing the quantity of water required to irrigate the lands that have been irrigated on the Hines place, including the ten or twelve acres of grass land, either by the testimony of the witnesses as to the quantity of water required per acre or by the computation based upon the theory that eight inches in depth of water is required for each of five irrigations during the season (being equal to

forty inches of rainfall), the findings of the court that the whole of the stream, to the extent of the capacity of the ditch, while there is sufficient water to fill it, and all that may thereafter flow during the irrigating season is necessary for agricultural and domestic uses on the Hines land, are not justified by the evidence.

It is contended by respondents that Senior acquired no rights by his notice and the actual diversion of the water in October, 1887; that riparian rights had before that attached to the lands of Mrs. Hines, she having proved up and claimed her final certificate of purchase. There is no merit in this contention. Her riparian rights could only entitle her to a reasonable use of the water upon her riparian lands, but having before she acquired title from the United States appropriated more water than was required for beneficial uses upon said land, she could acquire no right to any additional quantity under the law of riparian rights. . . .

Again, it is contended by respondents that it is not shown by any satisfactory evidence that there was ever any water used on the Senior place except at times when there was a quantity in the stream in excess of that diverted by the defendants, except the little that rises in the stream below defendants' dam and ditch, and that it does not appear that such right was ever interfered with. That Senior was entitled to have all of the stream (except so much as was legally appropriated by Hines) flow down to his land cannot be questioned; and if Hines, or the defendants, diverted more of the stream than was legally appropriated, it was clearly an interference with plaintiffs' rights; and, in the fourth finding, it is stated, after finding the posting of the notice and the construction of the ditch by Senior, that he "did divert from the stream at divers time such water as might be flowing therein at the point of said diversion for use upon his land."

By his appropriation Senior was entitled to the quantity of water reasonably necessary for the uses named in his notice, provided that quantity would naturally flow in the stream at the point of his diversion, as against all above him on the same stream, subject to the single exception of rights antecedently acquired. (*Crandall v. Woods*, 8 Cal. 136.)

Respondents contend, however, that the use of water on the Hines place began ten or eleven years before Senior settled upon his land, that Senior settled there in 1886, that his notice of appropriation was posted November 3, 1887, nearly seven years before this suit was begun, and again urge that plaintiffs' right to any of the water actually diverted through the Hines ditch is barred by the statute of limitations. This point was disposed of on the former appeal, where it was said: "The diversion through the Hines ditch of water not necessary for a useful purpose, for any length of time, would not give a right as against the plaintiffs, and, therefore, the application of the water to a beneficial purpose upon other lands by the defendants, or their predecessors in interest, the Ojai Valley Water Company, must mark the beginning of the adverse use"; and that use is clearly shown to have begun within five years before this action was commenced.

That plaintiffs have a useful purpose to which they desire to apply the water is clear. Senior testified that about eighty acres of the one hundred and sixty patented to him is capable of irrigation, and about twenty-five were in actual cultivation at the commencement of this suit. . . .

It is ordered that the judgment and the order denying defendants' motion for a new trial be reversed. . . .

Rehearing denied.

**Extent of Riparian Rights—Lake—Appropriation of Water
—Effect of Use on Riparian Right—Notice.**

S. J. DUCKWORTH and FLORA McKINLAY DUCKWORTH, Respondents, v. WATSONVILLE WATER AND LIGHT COMPANY et al., Appellants.

(150 Cal. 520, 89 Pac. 338.)

SHAW, J.—Plaintiffs are the owners of three hundred and twenty acres of land fronting on Pinto lake, the plaintiff Flora being the owner of the fee, and the other plaintiff the owner of a leasehold interest. They claim rights in the waters of the lake as riparian proprietors thereon, and the plaintiff

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S. J. Duckworth also claims a right by appropriation to take therefrom a quantity of water equal to a continuous flow of two hundred and fifty miner's inches under a four-inch pressure. The lake contains an area of about seventy acres. The defendant Watsonville Water and Light Company owns sixty-five acres of the bed and surface of the lake and all the land surrounding it, except the land of plaintiffs and two other tracts of small extent, and claims the ownership of, and the right to take and use all the waters of, the lake. The purpose of the action, as stated in the complaint, is to have the plaintiffs' alleged rights determined. The corporation defendant filed a cross-complaint alleging ownership of all the water of the lake, and asking that its right be also determined. (Judgment was given declaring that the plaintiffs have the right to take from the lake and use upon their land as much water as they could beneficially use thereon, not exceeding a continuous flow of two hundred and fifty miner's inches, and enjoining the defendants from interfering with the plaintiffs' right to such use, and that the defendant corporation take nothing by its cross-complaint. The defendants appealed from the judgment within sixty days after its rendition and present the evidence in the record by a bill of exceptions.

The plaintiffs derive their title to the land from Carmen Amesti de McKinlay, who on May 13, 1901, leased the land to S. J. Duckworth, and on August 6th, 1901, conveyed it to the plaintiff Flora McKinlay Duckworth, subject to the lease. In 1885, while Carmen Amesti de McKinlay was the owner in fee of the land, she made conveyances to the defendants Smith and Montague, whereby she granted to them "all and singular the water and riparian and water rights and privileges of every kind, character and description which belong, or in any manner pertain to" the three hundred and twenty acres of land, the same being particularly described therein, reserving, however, the right to water for domestic use and watering stock thereon. On January 21, 1897, Smith and Montague conveyed to the Watsonville Water and Light Company all the waters, rights, and privileges conveyed to them by Carmen Amesti de McKinlay as aforesaid. Smith and Montague thereupon, so far as appears, ceased to have any

interest in the property in controversy. They joined in the answer and join also in the appeal. There are some indications in the evidence that their holding prior to 1897 was for the benefit of the water company. In any event, as they have no present interest, their position in the case need not be further discussed. It is claimed that the evidence does not sustain the findings. As to several of them we think this contention is well founded.

1. There was an outlet to Pinto lake, through which water usually flowed from the lake during the rainy season of each year, but which was dry at all other times. One Grimmer owned a tract of land which abutted upon this outlet at a point some distance below the lake. On March 21, 1903, Grimmer conveyed to S. J. Duckworth "all riparian rights and other water rights and water" which he possessed in this outlet as appurtenant or belonging to this tract of land. This conveyance was made after the beginning of the action, but before the filing of the cross-complaint, and in his answer to the cross-complaint Duckworth averred that by virtue thereof he was a riparian owner to the waters of the lake. The court found, in accordance with this answer, that the plaintiff S. J. Duckworth "is a riparian owner of the waters of said Pinto lake, its tributaries and outlet," by virtue of this deed. Even if we consider the lake with its tributaries and outlet as forming one continuous stream of water, as the lower court found it to be, this finding is not technically true. Every owner of land upon a stream is in some respects interested in the entire stream. He has the right to use the water as it passes his land for domestic purposes thereon, and to take out a reasonable portion thereof for the irrigation of his abutting land; and for the protection of this right, which begins only when the water reaches his land, he has a certain right with regard to all the waters of the stream above his land, the right to insist that it shall not be polluted to his injury or diminished from use by other riparian owners above, so as to deprive him of his just portion, and perhaps, as to other than riparian owners, the right to prevent any substantial diminution of the amount of water which would naturally flow to his land. If nothing more than this was meant by the finding in question, we could not say that it was

not supported by some evidence, nor that it was not a correct general statement of the right of Duckworth under the Grimmer deed. But the finding is that Duckworth thereby became a "riparian owner" of the waters of the lake, and it appears that under it he claims some right, as against the defendant water company, to take water from the lake for use, not on the Grimmer land, but on the Duckworth land, which abuts on the lake far from the outlet, and that not only during the rainy season, or at such times as there is water flowing to the Grimmer land, but during all seasons and when the outlet is entirely dry. The court below seems to have intended this finding to declare some such right. This claim is contrary to the doctrine of riparian rights and to the general principles of law as well. Neither a riparian proprietor nor an appropriator has title or ownership in the water of the stream before it reaches his land, or point of diversion, respectively. This has been expressly decided with respect to appropriators. (*Parks M. Co. v. Hoyt*, 57 Cal. 46; *Riverside W. Co. v. Gage*, 89 Cal. 418, 26 Pac. 889; *McGuire v. Brown*, 106 Cal. 670, 39 Pac. 1060, 30 L. R. A. 384.) The same rule applies to the riparian owner. As a riparian owner, Grimmer had no title to the water, except as it passed in front of his land and constituted the stream. The right or title to the stream as it passed was a part and parcel of his land, a part of the realty. (See cases last cited.) Being a part of his realty on his land, it was also part of the realty of other riparian owners at the points where it passed over their lands. Hence, the title of each to the water exists only during such passage, and the right of each in the water during its course above consists only of the right to use such means as are necessary to preserve it until it reaches his land. Grimmer had the right to use a reasonable portion of the water running in the outlet by his land for the irrigation of his land riparian thereto, and to take the whole of it, if necessary, for domestic purposes. This right exists because the stream runs by the land, and thus gives the natural advantage resulting from the relative situation. When the stream ceased and the channel became dry, he for the time being ceased to be a riparian owner, so far as the present use of the water was concerned. His land

did not at those times border upon any stream. It did not then possess any natural right to the use of the water standing in pools or lakes at points above his land. During such dry periods he could obtain the use of water from such pools or lakes only by convention with the owners of the lands abutting upon them. He would not have it by virtue of any right pertaining to his own land. Furthermore, his riparian right is limited to his riparian land. It gave no right to use any of the water of the stream for any purpose upon land not riparian, nor upon any riparian land other than his own. No one can sell or convey to another that which he does not himself own. Grimmer could not by a transfer of his riparian rights sell to the plaintiff, as against third persons having interests in the water, the right to use the water upon any land, riparian or nonriparian, except his own, to which it originally attached. His deed operated to prevent him from complaining of a diversion, but it did not affect other parties. It does not appear that Grimmer had any water rights, except his right as riparian owner to the use of the water of the outlet. It follows, therefore, that Duckworth did not obtain anything by the Grimmer deed except the right to use the water of the outlet on the Grimmer land, when any water was flowing therein, and an estoppel against Grimmer to prevent complaint by him against any use of such water which Duckworth might make to the injury of the Grimmer riparian right as above defined. It did not in any respect add to his rights to take water from the lake for use on the Duckworth land, as against the defendants, or as against anyone excepting Grimmer and his successors in interest.

2. The findings further state that the water company has never exercised or used any of the water rights derived from the deeds from Carmen Amesti de McKinlay to Smith and Montague. This is true in the literal sense that it has not used any water upon the land to which these rights prior to those deeds attached. But it appears from the evidence that the water company was pumping water from the lake during the eight years extending from December, 1894, to December, 1902. The amount is not shown, but it was enough, during part of the time at least, according to the testimony of William A. White, its superintendent, to furnish water to

several strawberry-growers for irrigation of their plants, and so much that if the plaintiffs took the two hundred and fifty inches they claim, the two diversions would not leave much water in the lake at the end of the dry season. This evidence is not as definite as it should have been, but there being no evidence to the contrary, it established the fact that the company had taken a substantial quantity of water from the lake during the time specified. Such taking would have been contrary to riparian rights attached to the Duckworth land, if they had remained unsevered therefrom. By reason of its purchase of these riparian rights the company possessed the right, so far as that land and its owners were concerned, to use the whole or any part of the waters of the lake except such as were necessary for domestic use and for the watering of stock thereon. The pumping of the water was done in the exercise of this right, and it was a right obtained by virtue of the McKinlay deeds. This finding is therefore contrary to the evidence.

3. There is a finding to the effect that, after the execution of the deeds by Carmen Amesti de McKinlay to Smith and Montague, in 1885, she continued in possession of the water and water rights thereby granted to them, and that she and the plaintiffs, as her successors, did not relinquish possession thereof to the grantors, but have ever since then remained in possession thereof, and that they have been in the open, notorious, hostile, and adverse possession thereof for more than five years immediately before the commencement of this action. This finding has no support in the evidence. They did indeed remain in possession of the land, and continued to exercise all ordinary acts of ownership over it, including the use of the water of the lake for the watering of stock. This latter use of the water, however, was reserved in the deed, and hence it was not one of the rights granted. Even if it had been granted, the adverse use for the watering of stock alone could gain a right only to the extent of the use, and it would not confer any right to the additional use of water for the irrigation of land. There is no evidence that Mrs. McKinlay or either of the plaintiffs ever made any use of the water other than for the watering of stock, or claimed the right to do so as against the defendants, until

November, 1902, a few months before this action was begun.

[The finding seems to have been based on the fact that the defendants never entered upon the land of the plaintiffs for the purpose of exercising or asserting the right to use the waters of the lake which they obtained under the McKinlay deeds. But it was not requisite to the exercise of the rights granted by the deeds that they should enter upon the land, unless it became necessary to do so in order to get the water from the lake. The deed was evidently procured to protect the grantees from interference in their proposed diversion of water from the lake. They could get the water from any other point on the lake as well as from the limits of the McKinlay land, and it appears that they took it from the lower end of the lake. [This was a taking from the McKinlay land as well as from all the other land on the borders of the lake. The force of gravity would accomplish that.] The use which was made of the land by the plaintiffs and McKinlay was not antagonistic to the right which the defendants had to the water under the grant. It is not true, therefore, that the grantor and her predecessors continued or remained in possession of the rights of the grantee, nor that said rights were not relinquished to the grantees, nor that the possession of the plaintiffs and their predecessor extended to the water rights granted, or was hostile and adverse to the grantee, or open and notorious with respect thereto. According to the evidence, their actual use of the water, if any, did not begin under their adverse claim until the day of the trial in the lower court.]

4. There is some evidence that Pinto lake, with its tributaries and outlet, during the rainy season, constituted a running stream of water. It is clear that during the dry seasons there was no water flowing out of the lake, but there is evidence that during that period there was a slight flow from a tributary into the lake. We cannot agree with the appellant in his contention that the finding that the lake, or its tributaries, constituted a running stream is not sustained by the evidence. We think the better doctrine in respect to the character of a stream from which the statute provides for appropriations is that it is not necessary that the stream should continue to flow to the sea or to a junction with

some other stream. It is sufficient if there is a flowing stream; and the fact that it ends either in a swamp, in a sandy wash in which water disappears, or in a lake in which it is accumulated upon the surface of the ground, will not defeat the right to make the statutory appropriation therefrom, and we can see no reason why the appropriation in such a case may not be made from the lake in which the stream terminates, and which therefore constitutes a part of it, as well as from any other part of the watercourse.

5. The only use which the water company makes of the water is to take it to nonriparian lands, to be used thereon for irrigation. Respondents claim that the only right of the water company to the water shown in the case consists of the riparian rights pertaining to the narrow strip of land belonging to the water company surrounding the greater part of the lake, and the riparian rights under the McKinlay deeds, and that the use made of it is not in the exercise of either of these rights, but is inconsistent with each of them. (In regard to this claim, it is to be observed that so far as the use made of the water by the water company may affect the rights claimed by the Duckworths as riparian owners of the McKinlay land, they have no ground of complaint, being estopped by the McKinlay deeds and not having regained the rights by adverse possession. The estoppel does not extend to the water necessary for domestic use and for stock, but their right to that extent is not in dispute, nor have they been deprived of it by the water company. But S. J. Duckworth claims a right to a part of the water by appropriation, and with respect to the right thus claimed he has a status which entitles him to challenge the right of the water company. His privity with the McKinlay deed does not estop him from making an appropriation of any water in the lake that may be subject to appropriation, nor from demanding that the water company shall not make a greater use of the water than it is authorized to do by the rights which it is shown to have, if such use interferes with an appropriative right possessed by him. But the claim that the water company has not established any other right is not maintainable. Its cross-complaint alleges that it is, and for a long time

has been, "the owner and entitled to the exclusive use of all the waters" of Pinto lake. The plaintiffs in their answer thereto deny that the water company is, or has been, "the owner and entitled to the exclusive use of all the waters" of the lake. That is not a good traverse of the allegation. It is an admission that the water company is entitled to substantially all of the water. (*Fitch v. Bunch*, 30 Cal. 208; *Blood v. Light*, 31 Cal. 115; *Fish v. Redington*, 31 Cal. 185; *Reed v. Calderwood*, 32 Cal. 109; *Doll v. Good*, 38 Cal. 287.) This allegation of the cross-complaint, therefore, stands as an admitted fact of the case, except so far as it is inconsistent with the affirmative allegations of the answer thereto and of the original complaint. The effect, for the purposes of the trial, was to establish the fact that the water company owns, and has the exclusive right to use for any purpose and at any place, all of the water of the lake, excepting such portion thereof, or right thereto, as is alleged and was proven to belong to the plaintiffs, or either of them. Inasmuch as the evidence did not show, and the court did not find, that the alleged claims of plaintiffs included all the waters of the lake, the judgment that the defendants take nothing is contrary to the evidence and to this admission of the pleadings. The existing rights of other riparian owners not parties to this suit are not material to this case.

6. The right to appropriate water under the provisions of the Civil Code is not confined to streams running over public lands of the United States. It exists wherever the appropriator can find water of a stream which has not been appropriated and in which no other person has or claims superior rights and interests. And the right cannot be disputed except by one who has or claims a superior right or interest, and by him only so far as there is a conflict. It cannot be vicariously contested by another on behalf of the owner of the better right. The effect of an appropriation under the statute, when completed, is that the appropriator thereby acquires a right superior to that of any subsequent appropriator on the same stream. But he acquires thereby no right whatever as against rights existing in the water at the time his appropriation was begun. An appropriation

does not of itself deprive any private person of his rights; it merely vests in the appropriator such rights as have not previously become vested in private ownership, either by virtue of some riparian right or because of prior statutory or common-law appropriation and use. It affects and divests the riparian rights otherwise attaching to public lands of the United States, solely because the act of Congress declares that grants of public lands shall be made subject to all water rights that may have previously accrued to any person other than the grantee. An appropriation of water and use thereunder does not become effective to divest private rights in the stream, unless it has been continued adversely thereto for the period of five years under such circumstances as to gain a title by prescription, and then only to the extent of the use. The amount claimed in the notice is no measure of the right.

It follows that the attempted appropriation by S. J. Duckworth of a part of the water of the lake did not divest or affect the existing rights of the water company, either as riparian owners or by virtue of a prior appropriation or use. And so far as his claim was adverse to, and in conflict with, the prior rights and interests of the water company, it was entitled to a decree quieting its title against him and enjoining him from asserting such adverse title. This applies to the riparian right which attached to its strip of land partially surrounding the lake as well as to any other prior right which it possessed to the water. The fact that the company had not used the water on this narrow strip did not affect the riparian right. [A riparian right is neither gained by use nor lost by disuse. And for the protection of these riparian rights the water company is entitled to a judgment declaring Duckworth's appropriation subject to the riparian rights pertaining to its lands, and subject to all other prior rights of the water company, so that the continued use of the water by Duckworth shall not be adverse and shall not ripen into an easement which, in effect, would divest the rights of the water company.]

7. We have said that, because of the McKinlay deeds, and so far as the claim of plaintiffs as riparian owners is concerned, the water company can use the water for any

purpose, at any place, and in any quantity which leaves plaintiffs enough for stock and domestic purposes.] But the mere fact that the company is riparian owner on the lake gives it no right whatever to the water of the lake, except for actual beneficial use upon the land to which the riparian rights attach.] The evidence does not show that it is using the water on that land at all. It is carrying the water to other lands and places for use and sale. The admission of the pleadings above referred to relieves it of the necessity of establishing its right to do this, except as it may be affected by evidence in support of the specific rights alleged by the plaintiffs. But the right it actually exercises is not a right derived from the fact of its riparian ownership of the greater part of the lake shore and bed.

8. The claim of the respondents that the grant by Mrs. McKinlay of the rights pertaining to the land described in the deeds extended only to the water then standing in the lake, and that as soon as that water was exhausted by use, run-off, or evaporation, the rights ceased to exist, is utterly baseless, and needs no discussion further than to deny it.

9. In its conclusions of law the court declared that the defendants are estopped from claiming any rights under the McKinlay deeds. We find nothing in the evidence justifying this conclusion. The plaintiffs did not make an adverse claim until November, 1902, and the water company about the same time served on them written notice of its claim to the water under the said deed. This may not have been necessary, but it undoubtedly prevented any estoppel from arising in their favor by reason of any subsequent expenditure of money by them in the diversion of water in pursuance of their adverse claim, granting that such expenditure would otherwise have created an estoppel.

10. We have said that the water company is entitled to a judgment protecting its riparian right, although it has not used, and does not immediately propose to use, the water on its riparian land. This rule does not apply to any right which it has acquired by appropriation or use upon other lands, and this appears to be the source of the right which it has been exercising. Such right depends upon use and ceases

with disuse. (Civ. Code, sec. 1411.) It extends only to the water actually taken and used. The consequence is that, so far as the protection of this right and the water necessary to supply this use are concerned, the water company is not entitled to prevent an appropriation or use by others of the surplus of the waters of the lake, if there is any. So long as there is enough to supply it with the quantity of water which it has been so using, it has, in the protection of this right, no concern with the disposition of the remainder. It has the right, of course, to insist upon a reasonable ample quantity to last through the entire season, until rains renew the supply, and also to enjoin a depletion of the lake which will lower the water surface so as to substantially increase the cost of making the diversion it is entitled to make.

11. It may be that upon another trial the sufficiency of the notice of appropriation posted by S. J. Duckworth may not be important. But as this cannot be decided here, it is necessary to notice the objections urged against it. The notice states that the water claimed therein is to be used for irrigation upon the land owned by Mrs. Duckworth, describing it. This is a sufficient statement of the purpose for which the water was claimed and the place of intended use, and it is not vitiated by the additional statement in the notice that it was also to be used for irrigation by other parties to whom Duckworth might furnish it upon other land, which was not described. It was a good notice for the appropriation of water for use on the place designated, at all events. It states that the water is to be conveyed to the place of use "by a six-inch pipe, or by a pipe of other dimensions." This we consider sufficient to authorize a diversion of the quantity that could be carried in a six-inch pipe, and not exceeding the two hundred and fifty miner's inches claimed as the maximum. Whether or not it would justify a diversion within the amount limited if carried in a pipe more than six inches in diameter, is a question not presented, inasmuch as it does not appear that such pipe was proposed to be used. . . .

In conclusion, we deem it proper to say that, upon another trial, if the court shall decide that either of the parties possesses rights to the water, acquired by appropriation under

the statute or by diversion and use, it will be necessary to ascertain and declare the amount of water covered by the right owned by each respectively.

It is not necessary to mention the other points discussed in the briefs.

The judgment is reversed and a new trial ordered.

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Appropriation—Watercourse Defined.

SIMMONS v. WINTERS.

(21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7.)

LORD, J.—This is a suit in equity, brought by the plaintiff to enjoin the defendant from diverting the waters of a certain stream commonly known as “Sheep creek ditch” and for damages. The waters of Sheep creek ditch flow through the lands of the plaintiff and defendant. The theory upon which the suit is predicated is that Sheep creek ditch is an ancient and natural watercourse, with well-defined banks and channels, to the uninterrupted flow of which the plaintiff is entitled as a riparian owner, and by the diversion of which he has already been damaged, and will be irreparably damaged, unless the defendant be restrained and enjoined. The facts alleged being denied, the defense set up was prior appropriation of the waters of Little Sheep creek, by means of dam, ditches, and dry ravines, or draws, into what is commonly known as “Sheep creek ditch” for the purpose of irrigation, stock and domestic uses. The legal aspect of the case involves an inquiry into (1) what constitutes a watercourse; (2) the quantity of water to which an appropriation is restricted; and (3) the nature of the water right which may pass as appurtenant to the premises conveyed.

Considering these in their order, the inquiry is, What is included within the term “watercourse”? [Where there is a living stream of water, within well-defined banks and channel, no matter how limited may be the flow of its water, there is no difficulty in determining its character as a watercourse.]

but when the stream is of the class which periodically or occasionally flows through ravines, gullies, hollows, or depressions of land, and by its flow assumes a definite channel, such as indicates the action of running water, there is often some difficulty of distinction. A watercourse is defined by Bigelow, J., as "a stream of water usually flowing in a definite channel, having a bed or sides or bank, and usually discharging itself into some other stream or body of water." (*Luther v. Winnisimmet Co.*, 9 Cush. 174.) It is "a living stream with defined banks and channels, not necessarily running all the time, but fed from other and more permanent sources than mere surface water." . . .

The conclusion to be deduced from these decisions is that a watercourse is a stream of water usually flowing in a particular direction, with well-defined banks and channels, but that the water need not flow continuously,—the channel may sometimes be dry; that the term "watercourse" does not include water descending from the hills down the hollows and ravines, without any definite channel, only in times of rain and melting snow; but where water, owing to the hilly or mountainous configuration of the country, accumulates in large quantities from rain and melting snow, and at regular seasons descends through deep gullies or ravines upon the lands below, and in its onward flow carves out a distinct and well-defined channel which even to the casual glance bears the unmistakable impress of the frequent action of running water, and through which it has flowed from time immemorial, such a stream is to be considered a watercourse, and to be governed by the same rules.

2. In this state the doctrine of the right to water by prior appropriation for mining and irrigating lands has not been adopted or applied, except as the parties have acquired their rights under the act of Congress of 1866. Nor has there been any legislation by the state upon the subject. By the act of Congress, the right to water by prior appropriation from the streams upon the public domain was recognized and established. . . .

As there must be an actual diversion of the water from its natural channel by means of a ditch or other structure to effect the appropriation, any dry ravine, gulch, or hollow in

lands may be used for this purpose as a part of the ditch for conducting the water. Not only may these be used by the appropriator as a part of his ditch, but he may use the lower portion of the same bed or natural channel from which the water is taken. (Pom. Rip. Rights, sec. 48.) It is thus seen ✓ that, in order to make a valid appropriation of water, it is required to be made for some beneficial purpose then existing or contemplated, and that the amount of water appropriated must be restricted to the quantity needed for such purpose. ✓

3. Where there is no express grant or sale of a ditch or water right mentioned in the deed of the land, other than may be included in the use of the word "appurtenances," the question is whether the interest of the grantor in such ditch and right to the use of the water would be conveyed or pass to the grantee by such deed. The maxim of the law is that whoever grants a thing is supposed, also, tacitly, to grant that without which the grant would be of no avail. Where the principal thing is granted, the incident shall pass. (Co. Litt. 152a.) A grant of real estate will include whatever the grantor has power to convey which is reasonably necessary to the enjoyment of the thing granted. (3 Washb. Real Prop. 627.) By the grant of a mill, or the grant of land with a mill thereon, the waters, floodgates, and the like, which are of necessary use to the mill, pass as incident to the principal thing granted. . . . The general rule of law is that, when a party grants a thing, he, by implication, grants whatever is incident to it and necessary to its beneficial enjoyment. The incident goes with the principal thing. The idea and definition of an easement to real estate granted is, a privilege off and beyond the local boundaries of the lands conveyed. . . .

As this phase of the case may be easily disposed of upon the undisputed facts, it will be sufficient to say that the evidence shows that Clark Rowland and Joseph Cox were homestead settlers upon the public domain, to whom, in due course of time, were issued patents by the government to the lands upon which they had respectively settled in 1877; that the defendant, W. H. Winters, derives his title to the lands now owned and occupied by him, the same being the land

settled upon by the said Rowland and Cox, by deeds of conveyance from them, with the usual covenants and warranty; that before and at the time of said sale and conveyance, there were important water rights connected with such lands, and used for the purpose of their irrigation, and without which such lands were of little value; and that at the time of the appropriation of the water for uses specified by them and the defendant all the lands over and across which it was conveyed were unoccupied public lands of the government.

Upon this state of facts, it is clear, then, that when Rowland and Cox conveyed by their deeds the lands respectively settled upon by them with their appurtenances, they also conveyed their interests respectively in the ditch and water right which was connected therewith, and necessary to the cultivation and enjoyment of such lands, as much so and as certainly as if they had so declared by express terms in their deeds. In such case, within the principle already announced a grantor conveys by his deed, as an appurtenance, whatever he has the power to grant which practically annexed to the land at the time of the grant, and is necessary to its enjoyment in the condition of the estate at that time. But the theory upon which the plaintiff has brought his suit for an injunction, and what he is seeking to establish by his evidence, is that Sheep creek ditch is an ancient watercourse flowing through his land in two well-defined channels; that it has so continued to flow from time immemorial, without interruption or abatement, until the spring of 1888, when the defendant diverted and appropriated all of its waters, and that as a riparian owner he has a right to have its waters continue to flow in its channels through his land without interruption or diminution. His own and other testimony of those similarly situated shows, in substance, that he purchased the land he now occupies, and through which Sheep creek ditch now runs, from the state of Oregon in 1880, and at that time its waters were flowing through his land in well-defined channels, and so continued to flow about the same amount from year to year, varying some with the season, but at no time less than one thousand inches, until the spring or summer of 1888, when its diversion and appropriation by the defendant, together with an exceptionally dry season, affect-

ing its supply, caused its channels to become partially or almost wholly dry, so much so, at least, as to deprive him of water for irrigating his land, stock, and domestic purposes, greatly to his damage, which is variously estimated but by no witness at less than \$500 testifying in his behalf. His testimony designed to prove that Sheep creek ditch is an ancient watercourse, and that the waters flowing in its channels are its natural waters, as distinguished from waters diverted from Little Sheep creek, and turned into Sheep creek ditch, is derived principally from the opinion of witnesses based on the appearance Sheep creek ditch presented about the time of his purchase of the land, and subsequent thereto, with some little exception, not of much value for want of particularity and attention at the time to the subject matter now of inquiry. These witnesses, judging from the appearance Sheep creek ditch then presented, express the opinion that it is a natural watercourse, and that the waters flowing in its channels are its natural waters, with perhaps some little diminution. At the same time, some of these witnesses testify that the willows and cottonwood growing along its course were very small eight years ago, and that the soil was materially different from that on Prairie creek, not far distant, and which is conceded to be a watercourse; one of them saying that he did not know of any other creek in the whole Wallowa valley that had sod like Sheep creek ditch, indicating by the recent growth of the willows, and the nature of the soil through which Sheep creek ditch has cut its channels, that it is not an ancient watercourse, whose waters have been accustomed to flow therein regularly or continuously from time immemorial. The plaintiff had some of his witnesses admit that they knew and understood at the time of his purchase and settlement, as well as their own, that the grantors of the defendant, and others above him on Sheep creek ditch, claimed to have diverted the waters of Little Sheep creek by means of dams, ditches, gulches and ravines, or dry draws into what is now known as "Sheep creek ditch," and to be entitled to the use of its waters by prior appropriation. To better understand the case, we must now turn to the evidence for defendant, which shows that the grantors of the defendant, and three other persons, in 1877, settled, respectively, upon

certain lands belonging to the government, which being dry and arid and unproductive without irrigation, for the purpose of securing a supply of water for stock and domestic purposes, and the cultivation of their lands, went up to a natural watercourse called "Little Sheep creek," built a dam across it, and by digging ditches, and using gullies, ravines, or dry draws, as called by various witnesses, they diverted substantially all the waters of that stream, roughly estimated to be about two thousand five hundred inches, which they divided into equal parts among themselves, and caused these waters to flow therein, using as much as they each needed, and letting the surplus flow on, and thereby created the stream known as Sheep creek ditch. His evidence also goes to show that these ravines, depressions, or dry draws, as called, which they used to convey the waters to their lands, were dry draws, and in which no natural waters were accustomed to flow, but that they were caused by occasional bodies of surface water descending from the hills during times of melting snow and ice; that there is quite a number of such draws between Sheep creek ditch and Prairie creek, only a mile or two apart, and that they are very similar to such as were used for Sheep creek ditch; and that owing to the face of the country it is not possible for Little Sheep creek to have flowed through Sheep creek ditch. It also tends to show that no willows or shrubbery ever grew along its course until the diversion of the waters had been effected, and that the sod and soil through which it flowed was not such as belonged to or was found along natural watercourses, but that the effect of the diversion was to make Sheep creek a living stream, cutting out by the force of its waters through sod and soil, except occasional spreads here and there, a definite channel, and discharging its waters into Prairie creek. There were also several other dry draws or ravines between Sheep creek ditch and Prairie creek, which were only a short distance apart, but these, like those of which Sheep creek ditch had been partly constructed, were without water or shrubbery or other characteristic of a natural watercourse, or of the action of water, other than was produced by the mere drainage of surface water from melting snows; showing that the ravines and draws with which Sheep creek ditch is partly made were dry and with-

out water, as was testified to by several witnesses, and that it only assumed that character when, by dam and ditches connecting with dry draws and ravines, the waters of Little Sheep creek were diverted into them. The testimony establishing these facts was supported by several witnesses whose opportunities were such, both before and after the diversion had been effected, and the way and means by which it was accomplished, as to give great value to their testimony, especially in the absence of any contradiction—or attempt at impeachment. It was after the waters had been turned into Sheep creek ditch and it had begun to assume the appearance of a natural stream in running through the ravines and draws, that the principal witnesses for the plaintiff express the opinion that it was a natural and ancient watercourse; but much of their testimony in regard to the size of the willows and the character of the sod and soil through which it had cut a well-defined channel to Prairie creek, is but a corroboration of the testimony for the defendant, and hardly consistent with the theory of an ancient watercourse. It was the fact that these parties, including the grantors of defendant, who had constructed Sheep creek ditch, and turned the waters of Little Sheep creek into it, did not have any immediate use for the full amount of water diverted for the cultivation of their lands; that, after using such amount of it as they needed, they permitted the surplus to flow, and to create through the lands lying below a living stream, along which other persons, in course of time, settled, and used the water for irrigating their lands, stock and domestic purposes. Mr. Rowland, one of the grantors of defendant, after stating by whom, how, and by what means the diversion was effected, says: "The owners (5) used all they each needed, and let the surplus flow on through the ditch, to be taken up by the settlers below as they needed it. This was our custom." While Mr. Rowland does not state exactly the amount of water diverted, although one of the original parties, yet, it is estimated at two thousand five hundred inches, of which each party was to have five hundred inches, and according to which the defendant claims he was entitled to one thousand inches by his conveyances. As the amount of water needed for irrigation, in the first years of the settlement, was neces-

sarily small, a large surplus, estimated variously and varying from one to two thousand inches, was permitted to flow and create the watercourse upon which the plaintiff subsequently settled. Recognizing the force of the evidence as fatal to the contention that Sheep creek ditch is an ancient and natural watercourse, and to secure the right to the use of its waters to the extent already appropriated by him, the plaintiff, conceding that it is not a natural and ancient watercourse, claims that as the defendant and others have not appropriated for the irrigation of their lands the amount of water diverted, but permitted the surplus for several years, over the amount needed for their domestic and agricultural purposes, to flow on and become a watercourse, they have thereby fixed the amount of water necessary for their lands (which is admitted to be one hundred and ten inches appropriated by the grantors of the defendant, to which he is entitled by his conveyances), and that the plaintiff and others living below are entitled to appropriate the surplus, accustomed to flow through their lands. The law, as already stated, is that no one can by a prior appropriation claim or hold any more water than is necessary for the purposes of his appropriation. The grantors of the defendant, however much they may have diverted, could not have lawfully appropriated any more than was necessary to irrigate their lands, water their stock, and for domestic purposes. That much they were entitled to use, when needed or necessary for the purposes specified, and to that extent it was a valid appropriation of the waters to a beneficial use upon the lands, and that much as an appurtenance the defendant acquired by his conveyance from them, and was entitled to the use. Beyond the amount of water thereby taken his rights did not go. He could not waste it, and was only entitled to as much water, within his original appropriation, as was necessary to irrigate his lands. As the grantors of the defendant and their associates, according to the evidence, had diverted more water into Sheep creek ditch than they needed, and therefore more than they had intended to use or appropriate for irrigation, stock and domestic purposes, they permitted the surplus to flow through the ditch upon the lands of defendant and others and to be taken up and used by them. How much

there was of such surplus it is difficult to determine, but it amounted to one thousand inches, and at times much more, owing to its use and the season. The court below found that the amount of water used and appropriated by the defendant and his grantors did not exceed three hundred inches, varying from fifty inches to that amount, as needed for the purposes of the appropriation; but in our judgment four hundred inches would be nearer the amount intended to be appropriated for the uses specified; and as between the parties to this record, but no others, this should be taken as the amount of water that the defendant is entitled to use, leaving the surplus to flow on, according to the custom established by his grantors, to be appropriated by the settlers below. It is now claimed that the facts show that the defendant used or wasted this surplus upon his lands, to the damage and detriment of the rights of the plaintiff acquired in its flow through his land. The evidence indicates, without dissent, that the season was exceptionally dry, and that the snow in the mountains was scant, seriously affecting the source of Little Sheep creek's supply of water, and by reason thereof less water flowed down the ditch; that those above the defendant used the waters freely, as much as was necessary for the irrigation of their lands, within the purposes of their original appropriation; and that these causes combined to use the water in the ditch, leaving little or no surplus to flow on, causing the settlers below to complain, and a litigation to be threatened, which to avoid they used less water, and permitted more to pass through the ditch, except the defendant, who continued to use the amount he claimed that was necessary for the irrigation of his land, and to which he was entitled within the original appropriation. While there is some evidence indicating that the defendant used the water freely, and perhaps, on one or two occasions, more than was actually necessary, though this is contradicted, which, it may be admitted, was an excess of the amount he was entitled to use, if more than was actually necessary at the time, although within the original appropriation, yet it was plainly not these acts which caused the ditch and its channel to become dry during all the season, producing the grievances complained of. It was due to the more potential causes of a drought, aided by the other causes.

Everyone had a short crop those years, for they were years of drought, is the tenor of the evidence. So that, if the complaint was framed on this phase of the facts, no case is made upon which relief could be granted by injunction, much less when it is framed on the grounds of riparian proprietorship of a natural watercourse running through his lands from time immemorial, which is a different matter, and governed by different rules of law. In any view, therefore, there is a failure of proofs to justify the exercise of the jurisdiction invoked, which is always applied cautiously, and only when the right to the matter in question is clearly established, and an injurious interruption of such right ought to be prevented. The decree must be affirmed, and it is so ordered.

Tenant may Enjoin Diversion—Inconsiderable Injury No Defense.

AUGUST HEILBRON et al., Respondents, v. FOWLER SWITCH CANAL COMPANY, Appellant.

(75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535.)

TEMPLE, J.—The facts constituting the plaintiff's case in this action are pretty much the same as in the case of *Heilbron v. Last Chance Water Ditch Company*, recently decided by us. (*Ante*, p. 117.)

Plaintiffs are in possession of the rancho Laguna de Tache, containing about fifty thousand acres of land, under a lease for ten years, with the privilege of purchasing during their term. Kings river forms a boundary of this farm for thirty miles, and dividing at a point within this distance, one channel of the river called Cole slough flows through the rancho for a distance of ten miles.

Plaintiffs claim under a Mexican grant, made January 10, 1846. The claimant filed his petition for the confirmation of his title with the land commissioners to ascertain and settle private land claims in California, February 15, 1853, and,

the title being confirmed, a patent was issued for the same March 6, 1866.

Kings river rises in the Sierra Nevada Mountains, and carries at its lowest stages only about one thousand cubic feet of water per second, and at the highest stages, during the time of melting snows in the spring and summer, a much larger volume, sometimes as much as fifteen thousand cubic feet per second. During the ordinary stages of water, Cole slough carries the larger portion of the waters of Kings river, and during the period of low water all that reaches the point of divergence.

For more than two years before the bringing of this action the plaintiffs had maintained and cultivated about three thousand acres of alfalfa upon the land, and to irrigate the alfalfa, water their stock, and increase the productiveness of their land, they had built a dam in Cole slough, and constructed canals and ditches leading out of Cole slough, conducting the water over their land, increasing its productiveness, and furnishing water for their cattle, amounting to ten thousand head, which were entirely dependent upon the river for water to drink.

The defendant is a corporation, organized to appropriate and divert the water of Kings river, and avers in its answer that it has taken all the steps required under the Civil Code to authorize it to appropriate fifteen hundred cubic feet per second, flowing continuously, and at great expense has constructed a canal with a capacity of from one thousand to fifteen hundred cubic feet per second, sufficient for irrigating two hundred and forty thousand acres of land. That the stockholders own about sixty thousand acres of land, along the canal and its branches.

The land owned by the stockholders is a long distance from the river, none of them being riparian owners, and no portion of the water would ever find its way again into the river.

It was found as a fact that the defendant threatens to, and unless enjoined will, divert three hundred cubic feet of water per second, and as much as fifteen hundred cubic feet of water per second when there is the last-named quantity flowing in the river at the head of defendant's canal, and the rancho Laguna de Tache will be deprived of a material and

substantial quantity of water; that plaintiffs will be deprived of the use of water with which to irrigate said land, their cattle of sufficient quantity to drink, and that great damage and injury will occur annually, and of such extent that the same cannot be justly computed or estimated, and an action for damages would not afford an adequate remedy.

The defendant does not deny that it threatens to divert from the stream one thousand cubic feet of water per second, but denies that it proposes to take all the water of Kings river, or a sufficient quantity to injure the lands of plaintiffs, and alleges that defendant claims the right of withdrawal of water only in proportion to the supply which may be flowing in the river, and does not intend to divert the whole amount provided in its articles of incorporation, nor three hundred cubic feet, as alleged in the complaint.

The answer also avers that defendant was incorporated for the purpose of acquiring title to one thousand cubic feet of water per second, which amount they purchased from one Dusy, and that since they have taken under the code five hundred additional cubic feet per second, and that it has commenced the construction of a suitable dam and headgate sufficient to divert that amount of water, the canal being eighty feet wide and five feet deep, and had so far completed the work as to be able to divert fifteen hundred cubic feet of water per second, "so appropriated and owned by defendant, into its canal, and to conduct the same along and through its said canal a distance of twenty-one miles," and that they have expended in its construction one hundred and ten thousand dollars.

Plaintiffs recovered judgment, and the defendant appeals from the judgment, and from an order denying its motion for a new trial. The appeal from the judgment, not having been taken within one year, must be dismissed.

On the trial the defendant attempted to prove its right as an appropriator by showing its compliance with the provisions of the code. This evidence was excluded, on the objection of plaintiffs, and defendant excepted.

The court also excluded, against the exception of the defendant, evidence tending to show that there was no appre-

ciable difference in the quantity of water in Kings river at the time when defendant was taking water and at the time when it was not taking water from the river. In like manner, the court refused to permit the defendant to show that its officers had instructed its headgate-keeper that, whenever the water was low in the river, and there could be any cause of complaint by anyone, or it would make an appreciable difference in the quantity of water in the river, he was not to take water, but to shut down his gate, and only take water when it would make no appreciable difference in the quantity flowing in the river.

The first point made by appellant is, that where a party suffers no appreciable injury, and is threatened with none, he cannot invoke the aid of a court of equity to restrain a trespass, but will be left to his remedy at law.

Perhaps this proposition might be admitted without affecting the merits of this appeal.

It does not follow, because the injury is incapable of ascertainment, or of being computed in damages, and therefore only nominal damages can be recovered, that it is trifling or inconsiderable. It is doubtful if it can properly be said that there is any evidence in the case which tends to show, or if that which was offered would have tended to show, that the injury to plaintiffs was inconsiderable; that it was unascertainable, and in that sense inappreciable, may be a good reason why an injunction should issue. . . .

No doubt there are cases in which a court will refuse to interfere by injunction to prevent a trespass, where it can see that the injury will be slight, and the injunction may work great injury. Here the defendant professes to take from plaintiffs their property, really upon the plea that it is worth but little to the plaintiffs and much to the defendant. It is not an ordinary trespass. It is a perpetual taking of the property of the plaintiffs, a continuous nuisance, which may ripen into a right unless prevented.

The injury is one, also, which in its nature cannot be estimated. In the recent case of *Heilbron v. Last Chance Company* it was said: "The flow of the water of a stream, whether it overflow the banks or not, naturally irrigates and

moistens the ground to a great and unknown extent, and thus stimulates vegetation, and the growth and decay of vegetation add, not only to the fertility, but to the substance and quantity of the soil."

If this be so,—and it cannot be doubted,—it is obvious that in a climate like that where this land is situated, the benefit derived from a flow of water for thirty miles along its boundary, and ten miles through it, cannot be inconsiderable, but yet the extent of benefit must ever be an unknown quantity.

The defendant here states that the channel of the river above and along this land is deep, and therefore at times of ordinary flow the seepage cannot be great. If so, it must be important to plaintiffs that the channel should carry a full stream, and evidently at such times the percolation would be increased.

2. The right claimed by the defendant is not to appropriate the surplus waters of extraordinary floods, when the flow is more destructive than useful. It claims as an appropriator a certain quantity of water, adversely to the riparian proprietor; and if the claim be valid, it may be asserted at any stage of the water. But the rights of the riparian proprietor do not depend upon the quantity of water flowing in the stream. Nor can that flow be said to be an extraordinary flood which can be counted upon as certain to occur annually, and to continue for months. The defendant has no reservoir to retain the surplus waters of casual and unusual freshets, and its works would be of little value if its dependence were only upon such waters.

And certainly it would be a poor protection to the plaintiffs to have to depend upon the keeper of the headgate of defendant to take only a proportionate amount of water, or to take water only when it could be done without injury to plaintiffs. There was no error in excluding the offered testimony.

We see nothing in the suggestion that defendant is presumably the licensee of the United States, and that the United States, being an upper riparian proprietor, could take a reasonable quantity of water as against the lower riparian owner.

A riparian owner may not authorize, as against a lower proprietor, a company to take water from the stream, to be conducted at a distance and sold.

We see no occasion to discuss the question as to whether the river is navigable or not. In either event the result would be the same. The riparian owner on a nontidal, navigable stream has all the rights of a riparian owner not inconsistent with the public easement. . . .

Besides, Cole slough is not claimed to be a navigable stream. The right of the state to interfere with the flow there would certainly be limited to the interest of navigation.

The estate of the plaintiffs is sufficient to enable them to maintain this action. They were lessees for a term of ten years, with the privilege of purchasing during that time. If they fail to perfect the purchase, the fact that the injunction is in form perpetual cannot injure the defendant. If the estate which the injunction was designed to protect cease to exist, there would be no one to enforce the judgment, for there would be no one in privity with the plaintiffs. Practically, it would cease to exist. . . .

The appeal from the judgment is dismissed, and the order denying the motion for a new trial is affirmed.

Underground Currents—Presumption of Grant of Easement —Percolation Presumed.

THOMAS H. HANSON v. JAMES S. McCUE.

(42 Cal. 303, 10 Am. St. Rep. 299.)

By the Court, WALLACE, J.

This is an action brought by Hanson to restrain the defendant McCue from prosecuting the work of digging a tunnel on the lands of the latter, having for its object the obtaining of water for the purpose of selling the same in the neighboring town of San Rafael as an article of commerce. A perpetual injunction was decreed, and a motion for a new trial being denied, the case comes here upon appeal.

The defendant McCue is the owner in fee and in possession of certain premises situated in or near the town of San

Rafael, in Marin county, upon which there is a spring of living water having no natural channel or outlet. He de-raïgns his title through one Timothy Murphy, who owned the premises as early as the year 1844, when he constructed an artificial channel, by means of which he conducted the waters of the spring along the surface of the earth through a wooden trough, across a dry gulch, for a distance altogether of several hundred yards, in a southwesterly direction, to another lot where he had a growing vineyard, which he by this means irrigated. This artificial channel, before it reached the vineyard, passed over a considerable tract of land then unclaimed and unoccupied, intervening the spring and the vineyard, a portion of which was afterward, in 1854, taken possession of by one Smith, and subsequently, in 1856, sold by him to Hanson, the plaintiff, constituting the premises, or a part of the premises, now owned by the latter. The artificial channel has ever since been maintained, and it brings to the premises of the plaintiff Hanson a stream of living fresh water, which is used by him for culinary and general domestic purposes, and for irrigating the garden, ornamental grounds, fruit trees, flowers, etc., growing thereon; and he has no water on his premises except that found in this channel, or in a well which is fed by the percolations from the channel. The complaint alleges that the defendant McCue is digging a ditch or tunnel on his premises where the spring is found, in such a way that, if the digging be continued, it will inevitably cut off and intercept "the hidden and subterranean veins, streams, and sources of said spring, and which supply the same with water, and will thereby divert and lead away the waters which would otherwise flow into said spring, and will so lessen, diminish, or entirely cut off and stop the usual and ordinary supply and amount of water in said spring, that no water would flow therefrom to or upon said premises of the plaintiff, to his great and irreparable injury," etc.

It is to be observed that the court below found that, in making the excavation complained of, the defendant McCue was actuated not by any malice, but that his purpose was *bona fide*, the obtaining of water for commercial purposes. Further, it nowhere appears, either in the allegations of the

complaint, the findings of the court, or otherwise, by the record, that the spring in question is itself supplied, in whole or in part, by the flow of any defined stream of water, either subterranean or passing along the surface of the earth. Underground currents of water, flowing in defined channels, are known to exist in considerable volume, particularly in limestone regions; and where their existence is shown, there is no doubt, either upon reason or authority, that the rules of law which govern the use of similar streams flowing upon the surface of the earth are applicable to them. Such a stream, whether emerging or sinking, is in a greater or less degree a fertilizer of the land through which it flows. The right that it should flow "*ubi solebat*" comes *ex jure naturae*, and no one, merely because he is the proprietor of the soil through which it passes, can claim the corpus of the water of the flowing stream, or intercept its natural descent to the lands of the proprietor below. It not appearing that the spring here is supplied by any defined flowing stream, it must be presumed that it is formed by the ordinary percolations of water in the soil. The court, it is true, as we have already seen, mentions in its findings "the hidden and subterranean veins, streams, and sources of said spring" as being about to be cut off by the excavation; and the counsel for the plaintiff argues that this amounts to a finding that there is a subterranean stream of a defined character, and flowing in a defined channel, which is about to be diverted. But it is evident that the finding means, in substance, that the spring is supplied in some way by hidden veins or subterranean streams; but the court does not find that there is any stream known to exist at all, or if there is, whether it flows in a defined channel, which is the important point to be found. It amounts only to a finding that the "sources" of the spring—be they what they may—are about to be cut off. I do not understand the finding as establishing the exceptional fact that the spring here is fed by a known running stream of water flowing in a defined channel. The question then comes to this: One who is owner of the freehold—*usque ad infernos*—digging in the soil for the lawful purpose of his own profit, and not actuated by the malicious intent to wantonly deprive the plaintiff of the flow of water,

is, at the instance of the latter, enjoined from so digging, because he will thereby divert the waters which percolate the soil from the spring from which the artificial watercourse leads to the lands of the plaintiff. Water filtrating or percolating in the soil belongs to the owner of the freehold—like rocks and minerals found there. It exists there free from the usufructuary right of others, which is to be respected by the owner of an estate through which a defined stream of water is found to flow. The owner may appropriate the percolation and filtrations as he may choose, and turn them to profit if he can. To hold otherwise would be to hold that the plaintiff here could lawfully claim a right to convert the lot of McCue into a mere filterer for his own convenience. "Such a claim," said the supreme court of Pennsylvania, in *Pennsylvania R. R. Co. v. McCloskey*, 23 Pa. 528, "if sustained, would amount to a total abrogation of the right of property. No man could dig a cellar or a well, or build a house on his own land, because these operations necessarily interrupt the filtrations through the earth. Nor could he cut down the forest, or clear his land for the purpose of husbandry, because the evaporation which would be caused by exposing the soil to the sun and air would inevitably diminish, to some extent, the supply of water which would otherwise filter through it. He could not even turn a furrow for agricultural purposes, because this would partially produce the same result."

I am of the opinion that the plaintiff has no such interest in the percolating waters found in the defendant's land as will support this action.

It is next argued; however, that the fact that the plaintiff and those whose estate he has have enjoyed the stream flowing from the spring for upward of fifteen years without interruption, and adversely to the defendant and his grantor, will support a presumption of a grant of an easement by the latter to the former.

The presumption of the grant of an easement, when indulged, is because the conduct of the other party, in submitting to the use for such a length of time without objection, cannot be accounted for on any other hypothesis. The acts done by the party claiming the benefit of the presump-

tion, and his predecessors in estate, must, however, have been in themselves such as the other party having the right to object to, or complain of, did neither, but submitted to them without objection or challenge. Such acts, if continued during a sufficient period of time under such circumstances, would raise the presumption relied upon. But it will be seen at once that McCue, or those from whom he purchased, could, in the nature of things, have no right to complain that the water in the artificial channel, after leaving the spring, was appropriated below by the owners of the Hanson lot. If they had no right to complain in the first instance we are not driven to the presumption of the grant of an easement to account for why they did not complain.

Judgment and order reversed, and cause remanded for new trial.

Underground Waters.

BENJAMIN F. FORBELL, Respondent, v. THE CITY OF NEW YORK, Appellant.

(164 N. Y. 522, 79 Am. St. Rep. 666, 53 N. E. 644, 51 L. R. A. 695.)

Appeal from a judgment of the appellate division of the supreme court in the second judicial department, entered upon an order made January 9, 1900, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at special term.

The judgment grants a perpetual injunction restraining the city of New York from operating engines, driven wells and pumping stations known as the Spring Creek Pumping Station in the borough of Queens, city of New York, on the conduit line near the Kings county boundary line, and awards past damages to the plaintiff in the sum of \$6,000, together with the costs of the action.

The plaintiff was a lessee of certain farming lands situated near Spring creek within the county of Kings. He used a portion of the lands in question for the purpose of growing celery and watercresses.

The city of Brooklyn constructed a pumping station in the place in question early in 1885, and in 1894 sunk additional wells and made an additional pumping station. The effect of pumping at these stations was to lower the underground water table on this land, and thus made it unfit for cultivation of celery or watercresses, and the crops failed for many years prior to the commencement of this action in 1898.

LANDON, J.—The defendant makes merchandise of the large quantities of water which it draws from the wells that it has sunk upon its two acres of land. The plaintiff does not complain that any surface stream or pond or body of water upon his own land is thereby affected, but does complain, and the courts below have found, that the defendant exhausts his land of its accustomed and natural supply of underground or subsurface water, and thus prevents him from growing upon it the crops to which the land was and is peculiarly adapted, or destroys such crops after they are grown or partly grown.

The defendant does not take from his own land simply its natural or accustomed supply or holding, but by means of its appliances and operations it takes and appropriates a large part of the natural and accustomed supply or holding of the plaintiff's land. The case is not one in which, because the percolation and course of the subsurface waters are unobservable from the surface, they are unknown and thus so far speculative and conjectural as to be incapable of proof or judicial ascertainment.

Before the defendant constructed its wells and pumping stations it ascertained, at least to a business certainty, that such was the percolation and underground flow or situation of the water in its own and the plaintiff's land that it could by these wells and appliances cause or compel the water in the plaintiff's land to flow into its own wells, and thus could deprive the plaintiff of his natural supply of underground water. This it has accomplished just as it expected to do it; the evidence to that effect is about as satisfactory and convincing as if the case were one of surface waters.

That the defendant has so used its own as to injure the plaintiff there is no question. The question is whether the

plaintiff has or ought to have in the just administration of the law a remedy.

In *Smith v. City of Brooklyn*, 160 N. Y. 357, 54 N. E. 787, 45 L. R. A. 664, a case in which the defendant, by means of the same acts and appliances as it employed in this case, lowered the water in the plaintiff's surface stream and pond, this court, in holding the defendant liable for the damage thus caused, carefully refrained from considering the question whether the defendant would have been liable if it had simply lowered the subsurface level or body of underground water not contributing to the supply of plaintiff's surface stream or pond.

It may be conceded that the letter of the law, as expounded in many cases in this state, denies liability.

The earlier cases followed the law as stated in *Acton v. Blundell*, 12 Mees. & W. 324, and *Greenleaf v. Francis*, 18 Pic. R. (Mass.) 117. So far as the extraction or diversion of underground water upon the land of one proprietor affects no surface stream or pond upon the neighboring land, but simply the underground water therein, the rule is still adhered to.

The reasons usually assigned for the rule are that the owner of the soil may lawfully occupy the space above as well as below the surface to any extent that he pleases; that the water stored or held in his soil, so long as it remains there, is—unlike water flowing in a surface stream—a part of the soil itself. (*Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519.) That a different rule would prevent the reasonable use and improvement of land; that without a grant or positive statute there can be no easement in one parcel of land for the subsurface support or supply of subsurface water in another parcel; that the percolation and underground flow of water are out of sight and their exact operation and courses are conjectural and not susceptible of actual observation and proof; and finally, that the damages, if any, are the remote or indirect consequence of lawful acts.

It may be conceded that these reasons, or some of them, were ample to afford the proper rule of decision in the cases to which they were applied. We do not intend to impair

their applicability to like cases. But there are features of this case to which these reasons do not apply. As already intimated, the defendant installed its pumping plant knowing that the underground operation and habit of this store of water in its own and neighboring lands, including the plaintiff's, a total area of from five to eleven square miles, would enable it to capture the greater part of it.

In the cases in which the lawfulness of interference with percolating waters has been upheld, either the reasonableness of acts resulting in the interference or the unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land, has been recognized.

In the absence of contract or enactment, whatever it is reasonable for the owner to do with his subsurface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped, and their value impaired.

The learned trial judge found that the acts of the defendant were trespass. No doubt trespass may be committed by the projection of force beyond the boundary of the lot where the projecting instrument is operated. Injuries caused by explosions are familiar instances. We think the finding justified by the particular facts of this case. Force is not necessarily direct violence. It may be produced by the employment of such material agencies or instruments as become

effective by the co-operation of the forces of nature, and such is the case before us.

The distinction between a case like this and the cases of percolating waters in which liability has been denied was well pointed out by the learned judge who wrote for the appellate division in *Smith v. City of Brooklyn*, 18 App. Div. 340, 46 N. Y. Supp. 141. We refer to the opinion as a valuable contribution to the discussion of the subject.

We more readily conclude to affirm, because the immunity from liability which the defendant claims violates our sense of justice. It seems to pervert just rules to unjust purposes; it does wrong under the letter of the law in defiance of its spirit. The case is certainly unlike those which have preceded it in this court, and we may consider the rules announced in the previous cases in the light of the cases themselves. We recognize the fact that the water supply of a great city is of vastly more importance than the celery and watercresses of which the plaintiff's land was so productive, before the defendant encroached upon his water supply. But the defendant can employ the right of eminent domain, and thus provide its people with water without injustice to the plaintiff.

The judgment should be affirmed, with costs.

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**Percolating Waters—Artesian Belt—A Reasonable Use—
Diversion to Distant Lands.**

LEAH J. KATZ, Executrix, etc., et al., Appellants, v. MARGARET D. WALKINSHAW, Respondent.

(141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236.)

SHAW, J.—A rehearing was granted in this case for the purpose of considering more fully, and by the aid of such additional arguments as might be presented by persons not parties to the action, but vitally interested in the principle involved, a question that is novel and of the utmost importance to the application to useful purposes of the waters which may be found in the soil.

Petitions for rehearing were presented not only in behalf of the defendant, but also on behalf of a number of corporations engaged in the business of obtaining water from wells and distributing the same for public and private use within this state, and particularly in the southern part thereof. Able and exhaustive briefs have been filed on the rehearing. The principle decided by the late Justice Temple in the former opinion, and the course of reasoning by which he arrived at the conclusion, have been attacked in these several briefs and petitions with much learning and acumen. It is proper that we should here notice some of the objections thus presented.

It is urged, in the first place, that the decision goes beyond the case that was before the court; that the pleadings stated a cause of action solely for the diversion of water from an alleged underground stream, and that, therefore, there was no occasion for a discussion of the principles governing the rights to waters of the class usually denominated percolating waters. The proposition is not tenable. The complaint, in substance, states that the plaintiffs had wells upon their respective tracts of land, from which water flowed to the surface of the ground; that the water was necessary for domestic use and irrigation on the lands on which they were situate; that the defendant, by means of other wells and excavations upon another tract of land in the vicinity, prevented any water from flowing through the plaintiffs' wells to their premises, and that this was done by drawing off the water through the wells of the defendant, taking it to a distant tract and there using it. If the principle is correct that the defendant cannot thus, and for this purpose, take from the plaintiffs' wells the percolating waters from which they are supplied, then no further allegations were necessary, and the averment that the water constituted part of an underground stream may be regarded as surplusage. The complaint was thus treated in the opinion of Justice Temple, and he properly considered the question whether or not, eliminating the surplus allegation that there was an underground stream, the complaint stated a cause of action which was sustained by the evidence. The fact that the court below supposed that the existence of a stream of water was necessary to make the diversion of the water an actionable

wrong does not limit this court to the same view, if it be erroneous. If enough of the facts which are set forth in the complaint are established by the evidence, without substantial conflict, to constitute a good cause of action, then the nonsuit should not have been granted, although other allegations are not proven.

Many arguments, objections, and criticisms are presented in opposition to the rules and reasoning of the former opinion. It is contended that the rule that each land owner owns absolutely the percolating waters in his land, with the right to extract, sell, and dispose of them as he chooses, regardless of the results to his neighbor, is part of the common law, and as such has been adopted in this state as the law of the land by the statute of April 13, 1850 (Stats. 1850, 219), and by section 4468 of the Political Code, and that, consequently, it is beyond the power of this court to abrogate or change it; that the question comes clearly within the doctrine of *stare decisis*; that the rule above stated has become a rule of property in this state upon the faith of which enormous investments have been made, and that it should not now be departed from, even if erroneous; that even if the question were an open one, the adoption of the doctrine of correlative rights in percolating waters would hinder or prevent all further developments or use of underground waters, and endanger or destroy developments already made, thus largely restricting the productive capacity and growth of the state, and that, therefore, a sound public policy and regard for the general welfare demand the opposite rule; that the doctrine of reasonable use of percolating waters would require an equitable distribution thereof among the different land owners and claimants who might have rights therein, that this would throw upon the courts the duty and burden of regulating the use of such waters and the flow of the wells or tunnels, which would prove a duty impossible of performance; and, finally, that if this rule is the law as to percolating waters, it must for the same reason be the law with regard to the extraction of petroleum from the ground, and, if so, it would entirely destroy the oil development and production of this state, and for that reason, also, that it is against public policy and injurious to the general

The idea that the doctrine contended for by the defendant is a part of the common law adopted by our statute, and beyond the power of the court to change or modify, is founded upon the misconception of the extent to which the common law is adopted by such statutory provisions, and a failure to observe some of the rules and principles of the common law itself. In *Crandall v. Woods*, 8 Cal. 143, the court approved the following rule, quoting from the dissenting opinion of Bronson, J., in *Starr v. Child*, 20 Wend. 149: "I think no doctrine better settled than that such portions of the law of England as are not adapted to our condition form no part of the law of this state. This exception includes not only such laws as are inconsistent with the spirit of our institutions, but such as are framed with special reference to the physical condition of a country differing widely from our own. It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a case where that reason utterly fails." . . .

✓ ✓ The true doctrine is, that the common law by its own principles adapts itself to varying conditions and modifies its own rules so as to serve the ends of justice under the different circumstances, a principle adopted into our code by section 3510 of the Civil Code: "When the reason of a rule ceases, ✓ so should the rule itself." This is well stated in *Morgan v. King*, 30 Barb. 16: "We are not bound to follow the letter of the common law, forgetful of its spirit; its RULE instead of its PRINCIPLE. A rule of law applicable to the fresh- ✓ water streams of England may be wholly inapplicable to fresh-water streams in this country of the same nature and character, because of different capacity, or because the adjoining country may furnish a commerce for them unknown in England, and yet be subject to the same principle. If so, the common law modifies its rules upon its own principles, and conforms them to the wants of the community, the nature, character, and capacity of the subject to which they are to be applied." In *Beardsley v. City of Hartford*, 50 Conn. 542, 47 Am. Rep. 677, the court says: "It is a well-settled rule that the law varies with the varying reasons on which it is founded. This is expressed by the maxim: '*Cessante ratione, cessat ipsa lex.*' This means that no law can survive the

Johnston (6)

reasons on which it is founded. It needs no statute to change it; it abrogates itself." . . . Whenever it is found that, owing to the physical features and character of this state, and the peculiarities of its climate, soil and productions, the application of a given common-law rule by our courts tends constantly to cause injustice and wrong, rather than the administration of justice and right, then the fundamental principles of right and justice on which that law is founded, and which its administration is intended to promote, require that a different rule should be adopted, one which is calculated to secure persons in their property and possessions, and to preserve for them the fruits of their labors and expenditures. The question whether or not the rule contended for is a part of the common law applicable to this state depends on whether it is suitable to our conditions under the rule just stated.

It is necessary, therefore, to state the conditions existing in many parts of this state which are different from those existing where the rule had its origin.

In a large part of the state, and in almost all of the southern half of it, particularly south of the Tehachapi range of mountains, aside from grains, grasses, and some scant pasturage, there is practically no production by agriculture except by means of artificial irrigation. In a few places favored by nature crops are nourished by natural irrigation, due to the existence underneath the ordinary soil of a saturated layer of sand or gravel, but these places are so few that they are of no consequence in any general view of the situation. Irrigation in these regions has always been customary, and under the Spanish and Mexican governments it was fostered and encouraged. Even in the earlier periods of the settlement of the country, after its acquisition by the United States, and while the population was sparse and scattered compared to the present time, the natural supply of water from the surface streams, as diverted and applied by the crude and wasteful methods then used, was not considered more than was necessary. As the population increased, better methods of diversion, distribution, and application were adopted, and the streams were made to irrigate a very much larger area of land. While this process was going on a series of wet years augmented the streams, and still more land was put under the irrigating sys-

tems. Recently there has followed another series of very dry years, which has correspondingly diminished the flow of the streams. After this period began it was soon found that the natural streams were insufficient. The situation became critical, and heavy loss and destruction from drought was imminent. Still the population continued to increase, and with it the demand for more water to irrigate more land. Recourse was then had to the underground waters. Tunnels were constructed, more artesian wells bored, and finally pumps driven by electric or steam power were put into general use to obtain sufficient water to keep alive and productive the valuable orchards planted at the time when water was supposed to be more abundant. The geological history and formation of the country is peculiar. Deep borings have shown that almost all of the valleys and other places where water is found abundantly in percolation were formerly deep canyons or basins, at the bottoms of which anciently there were surface streams or lakes. Gravel, boulders, and occasionally pieces of driftwood have been found near the coast far below tide-level, showing that these sunken stream-beds were once high enough to discharge water by gravity into the sea. These valleys and basins are bordered by high mountains, upon which there falls the more abundant rain. The deep canyons or basins in course of ages have become filled with the washings from the mountains, largely composed of sand and gravel, and into this porous material the water now running down from the mountains rapidly sinks and slowly moves through the lands by the process usually termed percolation, forming what are practically underground reservoirs. It is the water thus held or stored that is now being taken to make out the supply from the natural streams. In almost every instance of a water supply from the so-called percolating water, the location of the well or tunnel by which it is collected is in one of these ancient canyons or lake basins. Outside of these there is no percolating water in sufficient quantity to be of much importance in the development of the country or of sufficient value to cause serious litigation. It is usual to speak of the extraction of this water from the ground as a development of a hitherto unused supply. But it is not yet demonstrated that the process is not in fact, for the most part, an exhaustion

of the underground sources from which the surface streams and other supplies previously used have been fed and supported. In some cases this has been proven by the event. The danger of exhaustion in this way threatens surface streams as well as underground percolations and reservoirs. Many water companies, anticipating such an attack on their water supply, have felt compelled to purchase, and have purchased, at great expense, the lands immediately surrounding the stream or source of supply, in order to be able to protect and secure the percolations from which the source was fed. Owing to the uncertainty in the law, and the absence of legal protection, there has been no security in titles to water rights. So great is the scarcity of water under the present demands and conditions that one who is deprived of water which he has been using has usually no other source at hand from which he can obtain another supply.

The water thus obtained from all these sources is now used with the utmost economy, and is devoted to the production of citrus and other extremely valuable orchard and vineyard crops. The water itself, owing to the tremendous need, the valuable results from its application, and the constant effort to plant more orchards and vineyards to share in the great profits realized therefrom, has become very valuable. In some instances it has been known to sell at the rate of fifty thousand dollars for a stream flowing at the rate of one cubic foot per second. Notwithstanding the great drain on the water supply, the economy in the distribution and application, and the much larger area of land thereby brought under irrigation, there still remain large areas of rich soil which are dry and waste for want of water. This abundance of land, with the scarcity and high price of water, furnish a constant stimulus to the further exhaustion of the limited amount of underground water, and a constant temptation to invade sources already appropriated. The charms of the climate have drawn, and will continue to draw, immigrants from the better classes of the eastern states, composed largely of men of experience and means, energetic, enterprising, and resourceful. With an increasing population of this character, it is manifest that nothing that is possible to be done to secure success will be left undone, and that there must

ensue in years to come a fierce strife, first to acquire and then to hold every available supply of water.

It is scarcely necessary to state the conditions existing in other countries referred to, to show that they are vastly different from those above stated. There the rainfall is abundant, and water, instead of being of almost priceless value, is a substance that in many instances is to be gotten rid of rather than preserved. Drainage is there an important process in the development of the productive capacity of the land, and irrigation is unknown. The lands that from their situation in this country are classed as damp lands would in those countries be either covered by lakes or would be swamps and bogs. If one is deprived of water in those regions, there is usually little difficulty in obtaining a sufficient supply near by, and at small expense. The country is interlaced with streams of all sizes from the smallest brooklet up to large navigable rivers, and the question of the water supply has but little to do with the progress or prosperity of the country.

It is clear also that the difficulties arising from the scarcity of water in this country are by no means ended, but, on the contrary, are probably just beginning. The application of the rule contended for by the defendants will tend to aggravate these difficulties rather than solve them. Traced to its true foundation, the rule is simply this: That owing to the difficulties the courts will meet in securing persons from the infliction of great wrong and injustice by the diversion of percolating water, if any property right in such water is recognized, the task must be abandoned as impossible, and those who have valuable property acquired by and dependent on the use of such water must be left to their own resources to secure protection for their property from the attacks of their more powerful neighbors, and failing in this, must suffer irretrievable loss; that might is the only protection.

"The good old rule

Sufficeth them, the simple plan.

That they should take who have the power,

And they should keep who can."

The field is open for exploitation to every man who covets the possessions of another or the water which contains and

preserves them, and he is at liberty to take that water if he has the means to do so, and no law will prevent or interfere with him or preserve his victim from the attack. The difficulties to be encountered must be insurmountable to justify the adoption or continuance of a rule which brings about such consequences.

The claim that the doctrine stated by Mr. Justice Temple is contrary to all the decisions of this court is not sustained by an examination of the cases. The decisions have not been harmonious, and in many of them what is said on this subject is mere dictum. A brief review of the cases will demonstrate this to be true. In *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299,—the first case on the subject,—it was not necessary for the court to say anything at all with respect to the right of a land owner to complain of a diversion of percolating waters. McCue's predecessor had made a ditch leading from a spring on his land across a tract of land belonging to Hanson's predecessor, and terminating upon another tract, also owned by McCue's predecessor, through which ditch he conducted water from the spring across the Hanson tract to his other land. This ditch in its course over Hanson's land leaked water in such quantities that it collected into a stream which Hanson used for irrigation. This was the only foundation for the right which Hanson has or claimed to the water. The court properly held that he had no right to the waste water and that McCue was not bound to continue to maintain the artificial stream for Hanson's benefit, but could by any means he chose change the use of the spring and the course of the ditch. The fact that the change was made by intercepting the percolating water which fed the stream was not material to the case, and all that is said as to the right to do so is dictum. The opinion, however, does, though unnecessarily, announce and approve the doctrine contended for by the respondent here. *Huston v. Leach*, 53 Cal. 262, decides only that the phrase "waters of said spring," in the decree of the court, meant defined streams running into or issuing from the springs, and did not include the percolations which fed the springs. *Hale v. McLea*, 53 Cal. 578, referred to a well-defined though very small underground stream, flowing through fissures in the

rocks, and has no relation to ordinary percolating water. The court held that the defendant could not cut off the entire stream, and at most could only use a reasonable portion thereof as an upper riparian owner. In *Cross v. Kitts*, 69 Cal. 217, 58 Am. Rep. 558, 10 Pac. 409, the court in its opinion, again by way of dictum, announces the doctrine that the owner of the soil is the absolute owner of the percolating water therein; but the decision is against this doctrine. It is a case of the court announcing one doctrine and deciding the contrary. The plaintiff, through a grant from defendant's predecessor, owned a right to take water on defendant's mining claim by means of a tunnel which served to collect the percolating water into a small stream of two miner's inches, which flowed out of the tunnel and was conducted by pipes to plaintiff's premises. This court decided that the defendant had no right to cut off the percolations which fed the stream issuing from the tunnel, although this was done in the legitimate work of mining his own land. The decision is in direct conflict with the dictum in *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299, and is in accord with the principles laid down by Justice Temple. It can only be distinguished upon the ground that the defendant was estopped by the grant of his predecessor to use the land so as to destroy the water right granted—a distinction which is not mentioned or referred to in the opinion. The distinction made in the opinion, and upon which the decision in *Cross v. Kitts* is based, is, that when percolating waters are gathered into a defined stream by means of a tunnel, the stream is property, and as such it is protected by law from injury or destruction by the diversion of such percolating water before it reaches the tunnel. There can be no distinction in law or reason between a stream consisting of percolating waters gathered together by means of a tunnel and one gathered by means of an artesian well. Therefore, the case supports Justice Temple's conclusion. The only point bearing upon the case at bar that was decided in *Painter v. Pasadena L. & W. Co.*, 91 Cal. 74, 27 Pac. 539, is, that the right of the owner of land to the water percolating therein may be reserved in a grant of the land, and that this right to such reserved water may subsequently be transferred. It

does not touch the question of the extent of the right of the land owner to such water, as against the adjoining proprietors or others claiming rights in it. In *Southern Pacific R. R. Co. v. Dufour*, 95 Cal. 616, 30 Pac. 783, 19 L. R. A. 92, the decision was put upon the ground that the excavation of defendant, which caused the diversion of percolating water of which plaintiff complained, was made upon defendant's own land for the purpose of obtaining the water for the better use of the land, which it was held he had the right to do, although it destroyed the spring or stream claimed by the plaintiff. The dictum of *Hanson v. McCue* was approved. The decision seems to be in conflict with *Cross v. Kitts*, although the latter case is not mentioned. In *Gould v. Eaton*, 111 Cal. 639, 52 Am. St. Rep. 201, 44 Pac. 319, the court below found that the tunnel complained of gathered and discharged a stream of water of which all except one and forty-three hundredths miner's inches was gathered from percolating waters in the sandstone, which did not come from the channel of the natural stream. It was this excess only which was in issue. The finding that it was percolating water was held to be conclusive upon the appellate court. It appeared that some of the percolating water thus developed would, if not interrupted, have reached the natural stream. The court adopts and approves the dictum of *Hanson v. McCue*, and holds that the plaintiff had no legal right to enjoin a diminution of the natural stream caused by a diversion of percolating water before it reached the channel. In *Los Angeles v. Pomeroy*, 124 Cal. 622, 57 Pac. 585, an instruction of the court below stating the dictum of *Hanson v. McCue* was criticised by the appellants, not for the reason that it restated that doctrine, but upon the ground that it did not class as percolating waters all such water as might be found in the sand or soil underneath the bed of a stream or adjacent thereto. So far as it restated the doctrine of *Hanson v. McCue*, it was favorable to the appellants, and, therefore, they did not object to that part of it. The court held that it was not subject to criticism on the ground that it did not properly define percolating waters. The decision, however, cannot be taken as an approval of the doctrine of *Hanson v. McCue*. In so far as that doctrine

was stated, it being favorable to appellants, it was not presented for consideration to the appellate court. The objection of the appellants, and the point considered by the appellate court, was that the instruction departed from the rule quoted in *Hanson v. McCue*. Inasmuch as the writer of this opinion was also the writer of the instruction under consideration, it may be proper to say that he did not give the instruction because he approved that part of it restating the doctrine of *Hanson v. McCue*. The instruction was given because an instruction embodying that doctrine had been requested by the appellants in the case, and the respondents, the plaintiffs, believing that it would not materially affect the verdict, consented that that part should be given in substance, rather than take the chances of a reversal of the case, should the supreme court hold its refusal to be erroneous. The remarks of the court in *Vineland District v. Azusa District*, 126 Cal. 494, 58 Pac. 1057, 46 L. R. A. 820, giving the ordinary definition of percolating waters, and stating the rule contended for by the defendant as applying thereto, call for no discussion. The court was referring to this solely for the purpose of giving the proper meaning to the word "percolating" as used in the findings, and to show that the word was not there used to designate waters which were not a part of the subterranean stream under consideration. In *Bartlett v. O'Connor* (Cal.), 36 Pac. 513, the defendants, with the intent to injure the plaintiff, attempted to reclaim their lands by drawing off the percolating water through an artificial ditch away from the natural stream. It appeared that this could have been done as well by deepening the natural channel of the stream. It was held to be an unlawful diversion. This comprises all the cases on the subject.

Excluding the cases in which the statement of the doctrine of absolute ownership is dictum, and looking to what has been actually decided, we have remaining only *Cross v. Kitts*, 69 Cal. 217, 58 Am. Rep. 558, 10 Pac. 409, holding that the owner of a mining claim, whose predecessor had granted a stream made up of percolating water collected by means of a tunnel, could not, even in the ordinary mining of his own land, interfere with the flow of percolating water to the

tunnel; *Southern Pacific R. R. Co. v. Dufour*, 95 Cal. 616, 30 Pac. 783, 19 L. R. A. 92, holding that a land owner can divert, for use on his own land, percolating water which feeds a spring rising on the land and flowing to an adjoining owner, although the diversion destroys the spring; *Bartlett v. O'Connor* (Cal.), 36 Pac. 513, holding that such a diversion cannot be made in the process of draining the land for reclamation, where the draining and reclaiming can be accomplished by another mode without diminishing the stream, and the mode used is adopted with the intention to injure the lower proprietor; and *Gould v. Eaton*, 111 Cal. 639, 52 Am. St. Rep. 201, 44 Pac. 319, declaring, in effect, that percolating water may be prevented from reaching a natural stream to the injury of a riparian owner, although the percolations are neither taken for use on the land where the diversion is made, nor in the use or reclamation of the land, but for use on other land distant from both the stream and the percolations. In view of this conflicting and uncertain condition of the authorities, it cannot be successfully claimed that the doctrine of absolute ownership is well established in this state. It is proper to state that in all the opinions which have so readily quoted and approved the supposed common-law rule, that injuries from interference with percolating waters were too obscure in origin and cause, too trifling in extent, and relatively of too little importance, as compared to mining industries and the wants of large cities, to justify or require the recognition by the courts of any correlative rights in such waters, or the redress of such injuries, there has been no notice at all taken of the conditions existing here, so radically opposite to those prevailing where the doctrine arose. It is also to be observed that in some instances in the eastern states, mentioned in the former opinion in this case, the injustice from the diversion of percolating waters has been so glaring and so extensive that the court there was compelled to depart from its previously decided cases and recognize the rights of adjoining owners.

✓ We do not see how the doctrine contended for by defendant could ever become a rule of property of any value. Its distinctive feature is the proposition that no property rights

exist in such waters except while they remain in the soil of the land owner; that he has no right either to have them continue to pass into his land as they would under natural conditions, or prevent them from being drawn out of his land by an interference with natural conditions on neighboring land. Such right as he has is, therefore, one which he cannot protect or enforce by a resort to legal means, and one which he cannot depend on to continue permanently or for any definite period.

It is apparent that the parties who have asked for a reconsideration of this case, and other persons of the same class, if the rule for which they contend is the law, or no law, of the land, will be constantly threatened with danger of utter destruction of the valuable enterprises and systems of waterworks which they control, and that all new enterprises of the same sort will be subject to the same peril. They will have absolutely no protection in law against others having stronger pumps, deeper wells, or a more favorable situation, who can thereby take from the unlimited quantities of the water, reaching to the entire supply, and without regard to the place of use. We cannot perceive how a doctrine offering so little protection to the investments in and product of such enterprises, and offering so much temptation to others to capture the water on which they depend, can tend to promote developments in the future or preserve those already made, and, therefore, we do not believe that public policy or a regard for the general welfare demands the doctrine. An ordinary difference in the conditions would scarcely justify the refusal to adopt a rule of the common law, or one which has been so generally supposed to exist; but where the differences are so radical as in this case, and would tend to cause so great a subversion of justice, a different rule is imperative.

The doctrine of reasonable use, on the other hand, affords ✓ some measure of protection to property now existing, and greater justification for the attempt to make new developments. It limits the right of others to such amount of water as may be necessary for some useful purpose in connection with the land from which it is taken. If, as is claimed in the argument, such water-bearing land is generally worthless ex-

cept for the water which it contains, then the quantity that could be used on the land would be nominal, and injunctions could not be obtained, or substantial damages awarded, against those who carry it to distant lands. So far as the active interference of others is concerned, therefore, the danger to such undertakings is much less, and the incentive to development much greater, from the doctrine of reasonable use than from the contrary rule. No doubt there will be inconvenience from attacks on the title to waters appropriated for use on distant lands made by persons who claim the right to the reasonable use of such waters on their own lands. Similar difficulties have arisen and now exist with respect to rights in surface streams, and must always be expected to attend claims to rights in a substance so movable as water. But the courts can protect this particular species of property in water as effectually as water rights of any other description.

It may indeed become necessary to make new applications of old principles to the new conditions, and possibly to modify some existing rules, in their application to this class of property rights; and, in view of the novelty of the doctrine, and the scope of argument, it is not out of place to indicate to some extent how it should be done, although otherwise it would not be necessary to the decision of the case. The controversies arising will naturally divide into classes.

There will be disputes between persons or corporations claiming rights to take such waters from the same strata or source for use on distant lands. There is no statute on this subject, as there is now concerning appropriations of surface streams, but the case is not without precedent. When the pioneers of 1849 reached this state they found no laws in force governing rights to take waters from surface streams for use on nonriparian lands. Yet it was found that the principles of the common law, although not previously applied to such cases, could be adapted thereto, and were sufficient to define and protect such rights under the new conditions. The same condition existed with respect to rights to mine on public land, and a similar solution was found. (*Kelly v. Natoma W. Co.*, 6 Cal. 108; *Conger v. Weaver*, 6 Cal. 557, 65 Am. Dec. 528; *Eddy v. Simpson*, 3 Cal. 253, 58

Am. Dec. 408; *Hill v. Newman*, 5 Cal. 446, 63 Am. Dec. 140; *McDonald v. Bear River etc. Co.*, 13 Cal. 233.) The principles which, before the adoption of the Civil Code, were applied to protect appropriations and possessory rights in visible streams will, in general, be found applicable to such appropriations of percolating waters, either for public or private use, on distant lands, and will suffice for their protection as against other appropriators. Such rights are usufructuary only, and the first taker who with diligence puts the water in use will have the better right. And in ordinary cases of this character, the law of prescriptive titles and rights and the statute of limitations will apply.

In controversies between an appropriator for use on distant land and those who own land overlying the water-bearing strata, there may be two classes of such land owners: those who have used the water on their land before the attempt to appropriate, and those who have not previously used it, but who claim the right afterward to do so. Under the decision in this case the rights of the first class of land owners are paramount to that of one who takes the water to distant land; but the land owner's right extends only to the quantity of water that is necessary for use on his land, and the appropriator may take the surplus. As to those land owners who begin the use after the appropriation, and who, in order to obtain the water, must restrict or restrain the diversion to distant lands or places, it is perhaps best not to state a positive rule until a case arises. Such rights are limited at most to the quantity necessary for use, and the disputes will not be so serious as those between rival appropriators.

Disputes between overlying land owners, concerning water for use on the land, to which they have an equal right, in cases where the supply is insufficient for all, are to be settled by giving to each a fair and just proportion. And here again we leave for future settlement the question as to the priority of rights between such owners who begin the use of the water at different times. The parties interested in the question are not before us.

In addition, there are some general rules to be applied. In cases involving any class of rights in such waters, pre-

liminary injunctions must be granted, if at all, only upon the clearest showing that there is imminent danger of irreparable and substantial injury, and that the diversion complained of is the real cause. Where the complainant has stood by while the development was made for public use, and has suffered it to proceed at large expense to successful operation, having reasonable cause to believe it would affect his own water supply, the injunction should be refused and the party left to his action for such damages as he can prove. (*Fresno etc. Co. v. Southern Pacific Co.*, 135 Cal. 202, 67 Pac. 773; *Southern California Ry. Co. v. Slauson*, 138 Cal. 342, 94 Am. St. Rep. 58, 71 Pac. 352.) If a party makes no use of the water on his own land, or elsewhere, he should not be allowed to enjoin its use by another who draws it out or intercepts it, or to whom it may go by percolation, although perhaps he may have the right to a decree settling his right to use it when necessary on his own land, if a proper case is made.

The objection that this rule of correlative rights will throw upon the court a duty impossible of performance, that of apportioning an insufficient supply of water among a large number of users, is largely conjectural. No doubt cases can be imagined where the task would be extremely difficult, but if the rule is the only just one, as we think has been shown, the difficulty in its application in extreme cases is not a sufficient reason for rejecting it and leaving property without any protection from the law.

It does not necessarily follow that a rule for the government of rights in percolating water must also be followed as to underground seepages or percolations of mineral oil. Oil is not extracted for use in agriculture, or upon the land from which it is taken, but solely for sale as an article of merchandise and for use in commerce and manufactures. The conditions under which oil is found and taken from the earth in this state are in no important particulars different from those present in other countries where it is produced. There is no necessary parallel between the conditions respecting the use and development of water and those affecting the production of oil. Whether in a contest between two oil-producers concerning the drawing out by one of the oil from

under the land of the other, we should follow the rule adopted by the courts of other oil-producing states, or apply a rule better calculated to protect oil not actually developed, is a question not before us and which need not be considered.

With regard to the doctrine of reasonable use of percolating waters, we adhere to the views expressed in the former opinion.

The judgment of the court below is reversed and a new trial ordered.

McFarland, J., Van Dyke, J., Henshaw, J., Lorigan, J., and Beatty, C. J., concurred.

TEMPLE J.—This appeal is taken from a judgment of nonsuit entered against plaintiffs on motion of defendant.

The action was brought to enjoin defendant from drawing off and diverting water from an artesian belt, which is in part on or under the premises of plaintiffs, and to the water of which they have sunk wells, thereby causing the water to rise and flow upon the premises of plaintiffs, and which they aver had constantly so flowed for twenty years before the wrong complained of was committed by defendant. The water is necessary for domestic purposes and for irrigating the lands of plaintiffs, upon which there are growing trees, vines, shrubbery, and other plants, which are of great value to plaintiffs. All of said plants will perish, and plaintiffs will be greatly and irreparably injured if the defendant is allowed to divert the water.

These facts are admitted, and further, that defendant is diverting the water for sale, to be used on lands of others distant from the saturated belt from which the artesian water is derived.

The plaintiffs contend that this subsurface water constitutes an underground stream, and that plaintiffs are riparian thereto, and as such riparian owners they are seeking relief in this case.

The defendant denies that she is taking or diverting the water from an underground stream or watercourse, and alleges that all the water which rises in the artesian wells on her premises, and which she is selling, is percolating water and is parcel of her premises, and her property.

In effect, therefore, while denying that she is doing any act of which plaintiffs can complain, she really only denies that she is diverting water from an underground watercourse, and asserts her right to dispose of the water in the manner alleged, because it is percolating water, not confined to a definite watercourse.

The court sustained that proposition, and for that reason granted defendant's motion for nonsuit.

The so-called artesian belt includes several square miles of territory. It is a large accumulation of earth upon the base of very high mountains, and is composed of detritus of varying quantity and material, with no regular stratification. Wells have been sunk at least to the depth of seven hundred and fifty feet, but no bedrock has been found. It has quite an incline from the mountain, and is from seven hundred to fifteen hundred feet above sea level. Mr. F. C. Finkle, a civil engineer, was the chief witness for the plaintiffs, and testified both as to facts palpable to the senses and as an expert. He says the saturated land is fed, first, by the underflow from the numerous ravines, canyons, and streams which enter the valley from the mountains; and secondly, by the rain and flood water upon, and absorbed upon the slope and between the artesian belt and the mountains. This water percolating down into the soil, and constantly pressed forward by water accumulating, finally gets under partially impervious earth, where it is held under sufficient pressure to create the artesian belt. The banks of this supposed subsurface stream, the witness thought, were on the west, "a cemented dike which runs through the valley, and the eastern boundary of it is the clay bank or dike at the south side of the Santa Ana river." Within these limits many ravines enter from the mountains, some of them carrying at times great quantities of water, much of which has been appropriated and carried off in pipes or cemented aqueducts.

It is evident that if there is any flow to this underground body of water thus held under pressure, it is by percolation. The witness stated that the process was the same the world over. The lower lands are saturated from above. "It is done by saturation from the rainfalls and the floods, and percolation through voids in the soil."

It is quite manifest that this body (if it can be so styled) of percolating water cannot be called an underground watercourse to which riparian rights can attach, unless we are prepared to abolish all distinction between percolating water and the water flowing in streams with known or ascertainable banks which confine the water to definite channels. All rain water which falls upon the hills and mountain sides which does not flow off at once as surface water is absorbed and percolates down in the same way to the valley below. No doubt limits can be found to every such flow, as in this case. The distinction is well established, and, in some respects, different rules of law applied to the two cases. The plaintiffs, therefore, cannot establish their claims upon the theory of an underground watercourse to which they are riparian. . . .

It is often asserted that *Acton v. Blundell*, 12 Mees. & W. 324, decided in exchequer chamber, in 1843, was the first case in England in regard to percolating water. This shows how unimportant, relatively, the subject is in England. It was an action for damages occasioned by working a coal mine on adjoining land, which interfered with water which was flowing underground to plaintiff's spring. The court instructed the jury, "that if the defendants had proceeded and acted in the usual and proper manner in the land for the purpose of working and mining a coal mine therein, they might lawfully do so." This instruction was held to be correct, and that is the real force and effect of the decision. But the chief justice pointed out some respects in which the right to water flowing in an open visible stream differs from an underground flow by percolation. The main difference so far as concerns the question under consideration was that percolation was occult, the regulation of which was a difficult matter. One who disturbed the course of percolating water by digging upon his own land could not tell whether he would drain his neighbor's well, nor could the person injured demonstrate that such was the cause of the injury. So, too, when one diverts water from a visible stream, the fact and the effect are at once known, while as to percolating water its course may be obstructed or changed without intent to do so, and without knowing that such would be the effect of

what was done. His lordship, the case being one of first impression, quotes a passage from a civil-law writer to the effect that when one digging upon his own land drains his neighbor's well, such neighbor has no cause of action: *Si non animo vicini nocendi, sed suum agrum meliorem faciendi, id fecit*. His lordship, however, although the case did not require it, disregarded the qualifications found in the civil law, and held that the case was not governed by law which applies to flowing streams, "but that it rather falls within that principle which gives to the owner of the soil all that lies beneath the surface; that the land immediately below is his property, whether it is solid rock, or pervious ground, or venous earth, or part soil and part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of this right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action."

This statement has been frequently quoted, both in England and in this country, and has been generally adopted as a correct statement of the law upon the subject. In *Acton v. Blundell*, 12 Mees. & W. 324, as has been said, the working of a mine upon an adjoining estate drained certain springs on plaintiff's land. It would have been sufficient to defeat plaintiff's action to have said that the working of a coal mine in a proper manner is a reasonable use of land, and that it was without malice or an intent to injure plaintiff. It is a general rule—in fact, a universal principle of law—that one may make reasonable use of his own property, although such use results in injury to another. But the maxim, *Cujus est solum, ejus est esque ad inferos*, furnishes a rule of easy application, and saves a world of judicial worry in many cases. And perhaps in England and in our eastern states a more thorough and minute consideration of the equities of parties may not often be required. The case is very different, however, in an arid country like southern California, where the relative importance of percolating water and water flowing in definite watercourses is greatly changed.

And it seems to me a great mistake is made in supposing that if the plenary property of a land owner in percolating water is denied, the alternative is to apply to such water all the rules which apply to the use of water flowing in water-courses having defined channels. The entire argument for what may be called the *cujus est solum* doctrine consists in showing that some recognized regulation of riparian rights would be inapplicable. It is said, for instance, that the law of riparian rights requires each proprietor to permit the water to flow as it was accustomed to flow. Apply this rule to subsurface water, and no one could drain his land, for he thereby prevents the water from flowing as it was accustomed to flow by percolation to his neighbor. The common-law method in the supposed case would be to apply the principle to the new case, although some judge-made rule as to how it shall be applied might stand in the way. The principle is clearly applicable. A riparian owner may not divert the water because he would thereby injure his neighbors who have equal rights in the stream. Still he may take a reasonable amount from the stream for domestic purposes, and that may equal the entire flow, although he thereby injures his neighbors. It is a question of reasonable use, and that applies both to the land of the person disturbing the percolation and to adjoining land. He may cultivate his land, and for that purpose ordinarily may drain it, and plow it, or clear from it forests, although all these operations may affect the flow of water to the lower proprietor, both in the watercourse and by percolation. He was allowed to become the owner for those purposes, and with the understanding that all other proprietors have the same right to use their land. The maxim, "*Sic utere*," etc., plainly applies as between such proprietors, very much as it does between different riparian proprietors upon the same stream. . . .

This rule of reasonable use answers most effectually the main argument against recognizing any modification of the *cujus est solum* doctrine as applied to percolating water, although in a majority of the cases which are claimed as authority against the rule of reasonable use the court takes pains to note that the act which disturbs the percolating water

was in using the land in the usual manner and without the intent of injuring a neighbor. . . .

But by far the most satisfactory case upon the subject is *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569. That was a most elaborately considered case, and this precise question is discussed with a fullness and ability which I am not so vain as to think I could improve upon. I would like to transcribe the entire argument, but as it is accessible to the profession, I need only say I adopt it in full. The decision was approved in *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276. . . .

Still this court was not called upon, and did not consider any such question. I think it clear that the American cases do not require us to hold that the maxim "*Sic utere tuo*" does not limit the right of the land owner to the use of the subsurface water, but, on the contrary, all the cases in which the question has been discussed held, or admit, that such maxim should limit such right where justice requires it. Such, I think, is the proper rule.

It follows that the court erred in granting the nonsuit, and the judgment is therefore reversed and a new trial ordered.

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Percolating Waters—Excavation in Permeable Material Reducing the Stream.

WILLIAM O. McCLINTOCK, Respondent, v. VICTORIA HUDSON et al., Appellants.

(141 Cal. 275, 74 Pac. 849.)

SHAW, J.—Judgment was given in the court below in favor of the plaintiff. The defendants moved for a new trial, and their motion having been denied, they now appeal from the order denying the same.

The complaint alleges that the plaintiff is the owner of a certain tract of land in Los Angeles county, and of all the subterranean water flowing therein and percolating through the soil thereof; that the plaintiff has made an excavation and constructed a tunnel, whereby a portion of the subterranean

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waters percolating through the soil is collected; that the excavation and the tunnel and the waters thereby collected are entirely upon the land described, and are the property of the plaintiff, and that the defendants claim some right or title to the subterranean waters in the land which is without foundation. Whereupon they ask that their title to the property be quieted. The land described in the complaint comprises about thirty-five or forty acres.

The defendants answered, denying the allegation that the plaintiff owns the subterranean waters flowing and percolating in the soil of the land described, and alleging that the land of the plaintiff, and also a number of tracts of land owned by the defendants respectively, each border upon and are riparian to a certain stream of water known as San Jose creek, which is a stream carrying during the dry season about five hundred miner's inches of water; that the plaintiff and the defendants, in connection with other riparian owners, were each entitled to use a portion of this water for the irrigation of their respective tracts of land; that all the water of the creek was necessary for that use, and that all the parties, including the plaintiff, had for many years diverted all the water of the creek and used the same for irrigation of their respective tracts of land; that the plaintiff, by means of the excavation and tunnel mentioned in the complaint, had collected together within his said tract of land a stream of water amounting to about one hundred miner's inches of water, which was composed of the percolating and subterranean waters flowing through and under the plaintiff's land; that this water so collected had been taken out by the plaintiff and carried to land which does not belong to him, and which is not riparian to said creek, and which has no right whatever to any of the waters of the creek; that if this water so collected is allowed to be taken out by the plaintiff, the amount of water flowing below in the bed of the creek will be diminished by the amount that is so collected by the tunnel, and that the defendants will thereby be deprived of the right to use that amount of the water flowing in the creek. The same allegations are repeated by way of cross-complaint, and there is a prayer that the plaintiff be enjoined from continuing to gather and divert the water by means of his tunnel.

The court finds that the waters collected and gathered by the tunnel, and flowing out of the same, consist of waters percolating in the soil of the plaintiff's land, and do not constitute any part of the waters of the creek; that there is not, and has not been, at any time any subterranean stream or streams, or any other waters, surface or subterranean, in the land of the plaintiff which contributed in any manner to the flow of the creek; that the defendants owned no part of the waters gathered or collected by the plaintiff by means of the tunnel and excavation, and that the taking of the water by the plaintiff through the tunnel and excavation did not diminish the supply of the water to which the defendants were entitled.

The evidence tends very strongly to show that it did constitute a part of that watercourse. The topography of the country and the situation of San Jose creek, with the character of its bed are alone almost sufficient to prove this fact. San Jose creek at that point, when there is any water flowing in it at all, runs in a shallow channel, situated in the bottom of a gulch, or ravine, about one hundred feet wide, with banks something over twenty feet in height. This gulch, or ravine, has, in close proximity on each side, a range of hills. Above, in the same valley, the ranges of hills separate and form a considerably wider valley, so that the entire watershed contributing to the flow of the creek comprises, according to the testimony, some seventy square miles, the water from all of which, if ordinary conditions prevailed, would be forced to flow down the narrow part of the valley in which the plaintiff's land is situated. The bed of the creek is composed of gravelly material, easily permeated by water. The excavation commences in the bed of the stream, and about at the level thereof, and for a distance of about four hundred feet it runs almost parallel with the stream at a distance of not more than fifty feet away, and at an elevation, at the upper end of the four hundred feet, about two feet below the bottom of the stream bed. The tunnel extends from the upper extremity of this excavation, deflecting somewhat from the course of the stream, and runs under the ground four hundred and eighty feet, to a point about three hundred feet from the bed of the stream, and some four feet below the

bottom of the bed. The bottom of the tunnel and excavation throughout its course consists of the same gravelly material as the bed of the stream. The evidence shows that, in the fall of 1898, when the tunnel was begun, there was a small surface stream of water flowing in the bed of the creek; that when it was completed early in the following spring, and even before its completion, the stream had ceased to flow, a thing which had never before occurred at that season; and that from that time until the trial, in the fall of 1899, there had been no water flowing in the creek at that point. From these facts the conclusion is almost irresistible that the excavation and the tunnel had either intercepted some of the water that would eventually have reached the stream, or had withdrawn some of the water from the stream by percolation through the gravelly material. The streams of this state, in their course through the lower levels, after they have left the precipitous sides of the mountains on which they originate, do not ordinarily flow over beds of rock or other material impervious to water. The usual condition is, that such streams flow in a shallow channel, over and through a mass of sand and gravel saturated with water from bedrock up to or slightly above the level of the surface of the stream.

It is not necessary, however, in this case to determine whether or not the court was wrong in refusing to characterize the flow of underground water, which the plaintiff took by means of his tunnel, as a part of the stream and necessary to its support and maintenance. The case of *Katz v. Walkinshaw*, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, *ante*, p. 245, decided November 28, 1903, establishes a rule with respect to waters percolating in the soil, which makes it to a large extent immaterial whether the waters in this land were or were not a part of an underground stream, provided the fact be established that their extraction from the ground diminished to that extent, or to some substantial extent, the waters flowing in the stream. By the principles laid down in that case it is not lawful for one owning land bordering upon or adjacent to a stream, to make an excavation in his land in order to intercept and obtain the percolating water, and

apply such water to any use other than its reasonable use upon the land from which it is taken, if he thereby diminishes the stream and causes damage to parties having rights in the water there flowing. If, therefore, it appears in this case that the finding of the court that the water taken by the plaintiff did not diminish the waters in the stream is not supported by the evidence, but that, on the contrary, the evidence shows that the stream was substantially diminished thereby, to the injury of the defendants, as the finding is necessary to support the judgment, the case must be reversed and a new trial had, even if the water, when taken, did not constitute strictly a part of the stream.

The court below manifestly did not consider that this question was of any consequence, and, having concluded that the water was not a part of the stream, it conceived the idea that it was not water to which the defendants were entitled in law, and that, consequently, its abstraction did not take any of the flow of the stream to which defendants were entitled. And this would have been correct if the principle had not been established in *Katz v. Walkinshaw*, *supra*, as stated. It is quite clear from the evidence that the court erred in finding that the stream was not diminished by the abstraction of the water by the plaintiff by means of the excavation and tunnel. Three hydraulic engineers testified on behalf of defendants, and each, after describing the condition and character of the material composing the bed of the creek and the bottom of the tunnel, stated that, in his opinion, necessarily, whatever water was taken from the excavation and tunnel diminished by that much the amount flowing in the stream below. There was no evidence to the contrary. One engineer was examined on behalf of the plaintiff in rebuttal, but he was not asked whether or not, in his opinion, the percolating waters gathered by the tunnel would eventually reach the stream, nor whether or not the waters in the tunnel came from the stream through the permeable material. There is no conflict in the direct evidence on this question, and the circumstances, generally, tend to confirm the opinion of the engineers. The court should have found from the evidence that there was a diminution of the stream caused by the taking

out of the water through the excavation and tunnel. Having found this fact, it would then be the duty of the court to ascertain and state the amount of the diminution. The plaintiff has no right to a decree declaring him to be absolute owner of water thus taken from the creek, or quieting his title thereto. His rights therein are no greater than they would be if he had taken the water directly from the stream.

There is no finding upon the allegation that the plaintiff was taking this water to distant and nonriparian lands. The court below probably deemed this immaterial, after having found that the water taken was no part of the waters of the creek, and did not reduce the quantity there flowing. The evidence shows clearly that the water in question was taken beyond the boundaries of the land described in the complaint, but it does not show to what use it was put by the plaintiff. He had no right, however, to take it beyond the lines of the land from which it was taken and divert it from the stream, either to let it go to waste or to use it on other lands. The motion for a new trial should have been granted.

The order appealed from is reversed and the cause remanded for a new trial.

Public Use—Percolating Waters—Form of Judgment.

WILLIAM NEWPORT et al., Appellants, v. TEMESCAL WATER COMPANY, Respondent.

(149 Cal. 531, 87 Pac. 372, 6 L. R. A., N. S., 1098.)

HENSHAW, J.—Perris Valley is a basin of forty or fifty square miles in extent. The surface soil is of inferior character, arid and alkaline. At a depth varying from eight to forty feet below the surface the land consists of unstratified silt, detritus, and gravels. The voids in this soil carry water, and the water-bearing soils are from one hundred to four hundred feet deep. Contiguous to Perris Valley is Menefee Valley, a somewhat similar though smaller tract of land. The surface soil of the Menefee Valley is of better quality

than that of Perris Valley, and, like the latter, rests on water-bearing gravels. The Temescal Water Company, defendant herein, is a corporation engaged in the collection and distribution of waters for the use of its stockholders and others. It supplies the inhabitants of the town of Corona with water. The town of Corona, with a population of two thousand seven hundred, has grown up dependent upon the water supply of defendant, and property to the value of four million dollars is subject to complete destruction should that supply fail. Of that supply all except an insignificant portion is taken by defendant from Perris Valley. In collecting and husbanding this water and delivering it to its consumers the defendant has expended nearly a million dollars, and the value of its water rights and other properties is at least two million dollars. In January, 1901, the defendant first purchased one hundred and sixty acres of this water-bearing land in Perris Valley, and from wells then existing, and from additional wells which it bored, pumped water from the underlying saturated gravels and carried it through its flumes and conduits for about forty miles to the lands of its stockholders at Corona. Subsequently, in March, 1903, the defendant purchased three thousand three hundred and forty additional acres of like lands. Thereafter it pumped and conveyed from its lands so acquired six hundred or more miner's inches during the irrigating season of each year. Upon March 1, 1904, some six land owners in Perris Valley, one of whom, the plaintiff Newport, is also a land owner in the Menefee Valley, brought this action for an absolute injunction to restrain the defendant from further pumping and carrying off the waters of Perris Valley. The essential allegations of their complaint, upon which were founded their demand for an injunction, are that the plane of saturation, when not illegally interfered with, stands from within eight or twenty feet of the surface of the ground; that upon their lands were growing trees, vines, grasses and shrubbery, sustained by the waters so standing at this level; that by the capillarity, percolation, and like natural forces, these waters were drawn toward the surface, moistening and nourishing the roots of herbage

and vegetation; that the effect of the pumping of defendant was to lower the plane of saturation so as to render it impossible for the water to reach the roots and thus to destroy these vegetable growths.

It was further charged that each of the plaintiffs used, and had used, large quantities of the water for surface irrigation for the growing of crops, and for the nourishing of vines and trees; that this lowering of the water plane by defendant made pumping more difficult and expensive, and would in time deprive plaintiffs of all water. Finally, it was alleged that Menefee Valley, with Perris Valley, formed a part of one and the same catchment basin, and that the effect of defendant's pumping in Perris Valley was to lower the plane of saturation under plaintiff Newport's land in Menefee Valley, and thus to work the same disastrous result. The defendant answered by denying the alleged acts and the resultant damage. It denied any subterranean connection between the water-bearing gravels of Perris Valley and Menefee Valley, and alleged that these valleys were disconnected and were in different watersheds. As to the lands in Perris Valley, it denied that in a state of nature the saturated gravels in any way contributed to the nourishment of the vegetation, and alleged that the lands were in great part alkaline and unfit for husbandry, and could not produce fair crops, either from the subsurface waters or from surface irrigation, or from both. Affirmatively it alleged that underlying the surface of Perris Valley, and but a few feet below the surface, was a stratum of hard-baked clay known as "hard-pan," below which stratum lay the saturated gravels, and which stratum prevented the capillary drawing of the waters to any point so near the surface as to aid vegetation; that the effect of this hard-pan was to turn the roots of the trees, shrubs, and grasses, which could not penetrate through it, giving all vegetation but a shallow and worthless soil in which to endeavor to live; moreover, that when surface irrigation was attempted, by reason of this hard-pan, the waters were never returned, and never could return to the underlying gravels from which they were taken, but were dissipated and wasted by evaporation. As affirmative defenses the defendant then pleaded

its expenditures, the nature of its works, the use to which it had been putting the water, the knowledge and acquiescence of the plaintiffs, and other matters, from which it asked the court to decree that plaintiffs' cause of action was barred by their laches and by estoppel.

After a protracted trial the court found in favor of the defendant upon substantially all the disputed matters. The findings of the court are attacked and some ninety-six specifications are set forth and argued. Plaintiffs' opening brief—three hundred and sixty-six pages in length—is largely devoted to an analysis of and argument upon the evidence in their endeavor to show that it does not support the findings of the court. The transcript contains about a thousand pages of the evidence. To follow and answer plaintiffs' argument would amount to no more than a setting forth of the evidence which does sustain the findings, and to do this fairly would fill a volume of our reports. It must suffice, therefore, to say that a critical examination satisfies us that the findings, one and all, are amply supported. But, briefly to illustrate the difficulty of discussing the findings within the broadest lines of judicial opinion, the finding touching Menefee Valley may be instanced. The court found: "That the percolating waters in said Menefee tract do not connect with the percolating waters in Perris Valley so that the water level in said Menefee Valley has been or can be affected by pumping water from lands in said Perris Valley." Upon this question a vast deal of evidence was introduced. Upon the part of the plaintiff, as has been said, it was contended that the subterranean connection between the two tracts of land was perfect, that the percolation and filtration were free, and that the direct effect of the pumping of defendant was to lower the water level in Perris Valley and to cause a corresponding lowering of the level in Menefee. Upon the part of the defendant it was shown that there was a decided ridge and elevation of ground between the two tracts, so that certainly the surface flows of the two were separate and distinct. Government topographical maps were introduced to show that the drainage of the basin of Perris Valley was down the San Jacinto river westerly to Lake Elsinore, while the drainage of the basin of Menefee Valley

was distinctly separate and trended southwesterly through Salt creek. Expert witnesses were likewise distinct. Certain of defendants' experts declared their belief in the existence of a more compact earth formation between Menefee and Perris valleys which would effectually prevent and forbid anything like a free seepage or percolation of waters. Defendant, in support of this, urges the existence of dry wells upon this divide,—that is to say, that wells dug upon either side of it in Perris Valley or Menefee Valley carried abundant water, while wells upon this divide yielded very little, and for practical purposes none at all. This in turn was disputed by plaintiffs, who showed that they had sunk wells along the pretended divide, and these wells went into water-bearing gravels. Defendant again answered this by saying that, conceding this to be so, the wells merely tapped the gravels, that the quantity of water which the wells would produce was not established by this, and still less that it did not establish a water communication between the two valleys; that the nonexistence of this water communication was demonstrated by the fact that the water level in the wells of Menefee Valley was about six and a half feet higher than the water level of the wells in Perris Valley before any pumping had taken place; and finally, that it was untenable to argue that Salt creek, into which Menefee Valley drained, with a grade of forty-eight feet and at a distance of three miles, would not lower the water level in the Menefee wells, which remained standing forty-eight feet above, while lowering the water level in Perris Valley ten feet at a distance of five or six miles would cause the water level in the Menefee tract to lower ten feet. This naked statement of the conflicting evidence has been given to illustrate the technical nature of the testimony. When it is considered what astute arguments may and have been raised upon either side in the analysis of it, it demonstrates the impossibility of attempting to discuss these arguments in all their varied phases. As we have said, it must suffice to say that the findings of the court are well sustained. Those findings were, first, as has been said, that there was no subterranean connection between the waters of Perris and Menefee valleys. This finding disposes of the alleged

injury to plaintiff Newport's land in Menefee Valley. The court in turn found the existence of the layer of hard-pan under Perris Valley, the alkaline nature of the soil, and the natural tendency of the surface irrigation to draw this alkali to the top of the ground and thus destroy vegetation. Specifically it found: "That about one-fourth of the lands of the plaintiff Newport in Perris Valley, nine-tenths of the land of the plaintiff Hoffman, and about one-third of the land of the plaintiff Pierce, are so impregnated with alkali, or mountainous, as to be rendered thereby practically unfit for agricultural purposes, and the remainder of the lands of said plaintiffs in Perris Valley are adapted to growing grain in seasons of abundant and seasonable rain, but during average years such land cannot be profitably farmed, and on account of hard-pan, subsoil and climatic conditions said lands are of little value for agricultural purposes, and when irrigated, do not produce profitable crops with reasonable regularity and abundance." This finding is attacked as being unsupported by the evidence. It is further said that it is too indefinite in its declaration that the lands have "little value for agricultural purposes," and that when irrigated do not produce profitable crops with "reasonable regularity and abundance." The evidence showed that of all the lands in Perris Valley owned by plaintiffs, which lands aggregate some five thousand five hundred and ninety acres, and which lands for the most part have been owned for twenty, fifteen, or ten years, less than fifty-eight acres were being irrigated by these plaintiffs. The plaintiff Elisha H. Pierce so irrigated "thirty-five acres, more or less," of alfalfa and one acre of trees and vines and vegetables which could not be grown without artificial irrigation. The plaintiff William Hoffman, in 1902, irrigated less than one-eighth of an acre upon which were growing vegetables and fruit trees. The plaintiff Waters for more than five years had been irrigating about two acres planted to trees, vines, and shrubbery. Plaintiffs Paggi, who purchased their land after the defendant's pumping plant was in operation, irrigated one-eighth of an acre of alfalfa and "twenty acres more or less" of grapevines; while plaintiff Newport never used any of the water in Per-

ris Valley at all. We do not set forth the small quantity of the land so irrigated out of the tract of forty or fifty square miles with any idea that because the use was little and the value small the defendants and the inhabitants of Corona which it supplied should in any way receive any preference, or should for such reason be thought to have any superior right. Such an argument has no standing in a court of law, and is distinctly repudiated. But the fact does serve to support the finding of the court that the land is arid and unprofitable. For it is not to be supposed that, with an abundance of water under the soil, if the soil itself was fit for cultivation, those waters would not long since have been used to transform the desert of Perris Valley into a fruitful garden.

The court further found that in the three years during which the defendant had pumped water from the valley, the plane of saturation had lowered some ten feet. But it is distinctly declared against the *post hoc propter hoc* argument that this lowering was caused by the pumping, and found that for several years prior to 1901, when the defendant commenced pumping, the long period of drought that had existed for the previous ten years, with the pumping of others than the defendant, had resulted in lowering the plane of saturation; that defendant's pumping has only contributed, with these other causes, to the lowering, and that there was no reason to believe that its continued pumping would in time exhaust the saturation of the water, but "with normal rainfalls and such as has been usual in the past forty years in Perris Valley and surrounding country, said water plane will return to its former level such as it was before any water was pumped therefrom, and will continue to furnish sufficient water for the reasonable use of plaintiffs and defendant without being greatly or permanently lowered." Since the time when defendant commenced to pump in 1901, the finding is that the water plane has been temporarily reduced an average of about ten feet, "part of which reduction has been caused by defendant, the remainder by plaintiffs, by third parties and by natural causes."

These findings so completely dispose of the controversy upon the merits that little is left to be said. It becomes

wholly unnecessary to consider the court's finding of laches. Important as the consideration of this question must prove to be where an absolute injunction is sought against work of public or quasi-public character, such discussion must be postponed until the time when it necessarily arises. It is to be observed, however, in this case that the plaintiffs do not ask for damages and an ancillary injunction until such damages are paid, but ask for an injunction absolute, without seeking monetary compensation. But on the question of monetary loss the showing is that the additional cost of pumping caused by the lowering of the water plane ten feet would be, for alfalfa, the crop requiring the most water, not more than one dollar per acre. So that \$58 per year would fairly represent the monetary loss of these plaintiffs for all the land which they irrigated, even if the lowering of the plane were wholly attributable to defendant. But, as has been said, the finding of the court establishes that the lowering was due to the use of water by plaintiffs themselves and by others, as well as to the natural cause of drought, quite as much as to the operations of defendant.

And, finally, upon this proposition it may be said that where the interests of the public are involved and the court can arrive in terms of money at the loss which plaintiff has sustained, an absolute injunction should not be granted, but an injunction conditional merely upon the failure of the defendant to make good the damage which results from its work. Such an action, if successful, should be regarded in its nature as the reverse of an action in condemnation. The defendant in effect would be held to be damaging private property without just compensation first made to the owner, and failing to make such compensation, should be enjoined from further damage. For, as was said by this court in *Montecito Valley v. Santa Barbara*, 144 Cal. 578, 77 Pac. 1113, in a case similar to this, "a prohibitory injunction should only be granted if any and all other forms of relief should be found inadequate." In this case, however, the plaintiffs sought an absolute injunction. This they conceived to be their right under *Katz v. Walkinshaw*, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, which had been decided but two months before the com-

mencement of their action. The decision of *Katz v. Walkinshaw* is adhered to, but as plaintiffs on the facts failed to establish any ground for relief under the principles there laid down, no amplification of those principles becomes necessary. . . .

For the foregoing reasons the judgment and order appealed from are affirmed.

Effect of Partition—Diversion of Underflow—Adjustment of Rights in Surplus.

VERDUGO CANYON WATER COMPANY et al., Appellants, v. TEODORO VERDUGO and C. E. THOM, Respondents, and E. M. ROSS, Appellant.

(152 Cal. 655, 93 Pac. 1021.)

SHAW, J.—The plaintiffs herein appeal from the judgment and from an order denying their motion for a new trial. The defendant, E. M. Ross, appeals from certain parts of the judgment. All the appeals are presented upon the same record.

The action is by the Verdugo Canyon Water Company and some three hundred other persons, who are its stockholders, to determine and quiet title to certain water rights claimed by them in a stream of water flowing in the Verdugo canyon, and to enjoin the defendants from taking the water alleged to belong to the plaintiffs.

It is alleged that the plaintiffs, other than the corporation, are the owners of lands bordering on the stream; that, as such land owners, they have the right to take three-fourths of its waters, flowing above and below the surface of the ground, for use on their lands in proportion to the area of the respective holdings; that the corporation was organized for the purpose of diverting said waters from said stream and distributing them to the plaintiffs and other persons entitled thereto; that it has constructed works, pipes and ditches for that purpose, and is now engaged in said diversion and distribution; and that the defendants claim adversely the waters

to which the plaintiffs are entitled, and, without right, are taking and using said waters, to the plaintiffs' injury.

The lands comprising the La Canada Ranch and the San Rafael Ranch in Los Angeles county were, prior to 1871, held in common ownership by a number of persons. The two ranches adjoined, La Canada lying north of San Rafael. In that year, in an action between them for that purpose, a partition of the two ranches was made by judicial decree. Verdugo Canyon begins near the base of Sister Elsie Mountain in La Canada Ranch, and extends from thence southerly across the line between the two ranches and for several miles into the San Rafael Ranch, where, after passing through a rather narrow gorge, it opens or expands into a wide plain forming part of what is usually known as the San Fernando Valley. The floor of the canyon is comparatively level and varies in width from about seven hundred feet to something over eighteen hundred feet, with high hills or mountains on each side. In these mountains are a number of side canyons in which small rills flow, the water sinking in the ground, either before or immediately after reaching the floor of the canyon. During times of heavy rain, and for a few days afterward, a stream of water flows down the canyon, through all the lands in controversy and into the Los Angeles river, some distance below. This is of infrequent occurrence, and as it has no particular bearing upon the questions presented, no further consideration need be given to it.

At the time the partition decree was made, three streams arose in the canyon, within the San Rafael Ranch, and flowed for some distance separately, and then united and flowed for some distance on the surface down the canyon, finally sinking in the sand and gravel. These streams oozed out of the loose material composing the bed of the canyon at three places nearly of the same level or altitude, almost on the same line extending laterally across the canyon, and near the northerly line of the canyon tract hereinafter mentioned. One arose near the east side and somewhat farther up the canyon than the other two. It is called the "east-side stream." The other two arose nearer the western side, and united in a single stream, before joining with the east-side stream. The stream composed of these two is called the "west-side stream."

In partitioning the ranches the waters of these streams were apportioned among and set apart to certain of the lands assigned in severalty. A tract of two thousand six hundred and twenty-nine and one one-hundredth acres, much of it unfit for irrigation, was set off to the defendant Teodoro Verdugo. It embraces the entire canyon from the narrows for several miles toward the north, and includes the places whereon the aforesaid streams arose to the surface. It will here be designated as the "Canyon tract." (The east-side stream, so far as required, was set apart to the Canyon tract for irrigation and other uses thereon.) The combined west-side stream and any surplus of the east-side stream remaining after the Canyon tract was supplied therefrom were set off to a large body of land situated on the plain below the narrows, for irrigation and other uses thereon. These lower lands covered an area of about three thousand three hundred and thirty-three acres, and were generally fit for irrigation. They were divided and set off in severalty in tracts of various areas to twenty-one different owners. For convenience of designation the west-side stream was divided into ten thousand parts. It was apportioned to the land at the ratio of three ten-thousandths of the water to each acre of the land. A large part of this three thousand three hundred and thirty-three acres was afterward subdivided and sold in smaller tracts, each having its proportionate share of the waters originally assigned. The plaintiffs are the owners of about three-fourths of the land to which this water was assigned, and the defendants C. E. Thom and E. M. Ross, respectively, each own about one-eighth thereof. The land of the plaintiffs, collectively, is entitled to three-fourths of this water and that of Thom and Ross, respectively, to one-eighth thereof. The Verdugo Canyon Water Company diverts this water for all the interested parties, including Thom and Ross, by means of dams and diverting works, to the expense of which Thom and Ross contributed one-eighth each. Their shares of the water are delivered to their respective pipes near the diverting works. The defendant E. M. Ross has also become the owner of several hundred acres of land of the Canyon tract and has an orchard of about one hundred acres thereon, upon which he uses water from the east-side stream for irrigation.

In 1871, and for years thereafter, there appears to have been sufficient water in the streams for all the uses to which it was then applied by the persons entitled thereto. As years passed, the area of land set out to orchards, vineyards, and other fruits by the plaintiffs and defendants was very much increased, and the orchards of citrus fruits also required more and more water as they grew older, so that about the year 1891 the water began to be insufficient. In the year 1893 a series of dry years began, and they continued until 1902, when the present action was begun. From the increased demand and the decreased supply the result has been that during and after 1893 the water naturally flowing on the surface was not enough to keep alive and properly nourish the trees and plants on the land entitled to share in it. From time to time the parties, or some of them, increased their individual supply of water by sinking wells deep in the strata of sand and gravel underlying the bed of the canyon and the plain below, and pumping water therefrom. For a like purpose, in 1894, the Verdugo Canyon Water Company and the defendants C. E. Thom and E. M. Ross jointly purchased about eight acres of land, part of the Canyon tract, situated at the head of the narrows, and extending across the canyon from the west wall toward, but not quite reaching, the east wall thereof. Upon this tract, at joint expense, in the proportion of three-fourths to the company and one-eighth each to Thom and Ross, they have constructed what is called a submerged dam, part of its length consisting of a cement wall and part of wooden cribs, by which the water flowing underground in the sand and gravel of the canyon is collected and diverted, and this water has ever since then been distributed to the respective parties along with the surface flow of the west-side stream, and in the same proportion. This dam, so far as it has been constructed, is about five hundred feet long, including the cribs. Further construction thereof ceased in 1896. For many years past all the waters of the east-side stream have been used on the Canyon tract, and there has been no surplus therefrom to add to the waters of the west-side stream.

In 1898 E. M. Ross sunk a well in the canyon at a point about one thousand feet above the submerged dam, and near

the east side of the canyon, in lands constituting a part of the canyon tract. The well was completed in March, 1899, and in May, 1899, he began pumping, and has ever since then, during the irrigating seasons, pumped therefrom a stream of water averaging a flow of eighteen miner's inches flowing under four-inch pressure. He has used this water on land in the Canyon tract, and also on other lands, and he claims the absolute right to use it on any other land, as he pleases, without regard to the effect on the amount of water collected by the dam, or flowing in the west-side stream. In 1897, Teodoro Verdugo sunk a well in the canyon and placed a pump therein some two miles above the dam and near the point where the streams formerly rose to the surface, which he began to pump in the spring of 1898, and from which he has ever since, during the irrigating seasons, pumped a stream of about thirty-five miner's inches of water, which he has used to irrigate lands in the Canyon tract, claiming the right to do so. The defendant C. E. Thom also has three wells near, but above, the Verdugo well, from the easterly one of which he claims the right to pump water for irrigation of his land below the dam, or of any other land, but no water has been pumped therefrom. Thom and Ross have each put down wells in the canyon, at a point about one thousand five hundred feet below the dam, from which they each pump water to irrigate land of the San Rafael Ranch below the dam and entitled to water from the west-side stream under the decree, and each claims the right to continue to do so. These several diversions of underground water by the defendants for their exclusive use, and these claims of right to do so, occasioned this suit.

1. The partition decree did not change the character of the rights of the respective parties to the waters of the canyon. It created no new rights or estate therein, but merely divided and apportioned the pre-existing rights and estates. Prior thereto the lands were in one common ownership, and the part of the San Rafael Ranch here involved was all riparian to that stream. Its waters were therefore not merely appurtenant thereto, as a right acquired by prescription, or appropriation, would be, but were a part of the land itself, as parcel thereof. This was the case with respect

to each of the three surface streams then flowing, and also with respect to all the underground flow which constituted a part of said streams. In making the partition of these waters, the right to the use of the surface streams, which previously attached to the entire ranch, was completely severed from the other parts thereof and transferred to the lands to which water was assigned. The right thus assigned to each tract by the partition was a riparian right, and it continues to possess that character, with all its attributes, since the partition as fully as before.

With respect to the two surface streams, known as the east-side stream and the west-side stream, respectively, the partition effected a complete separation of the waters, the east-side stream being given, so far as necessary, and for many years past this has meant all of it, to the Canyon tract exclusively, and the west-side stream exclusively to the lands below the mouth of the canyon. The water of this west-side stream was not actually separated among the owners of the several tracts. It was merely apportioned between them, giving to each in common a certain number of undivided shares of the whole.

It is obvious that the continued presence in the soil, sand, and gravel, composing the bed of the canyon, of a sufficient quantity of water to supply and support these surface streams in their natural state, is essential to their existence and preservation, and that the parties have as clear a right to have this quantity remain underground for that purpose as they have to the stream upon the surface. Neither party should be permitted to decrease this necessary quantity of underground water to the depletion of the surface stream and the injury of those to whom it has been assigned. This much is clear from the previous decisions of this court. (*City of Los Angeles v. Pomeroy*, 124 Cal. 621, 57 Pac. 585; *McClin-tock v. Hudson*, 141 Cal. 280, 74 Pac. 849; *Cohen v. La Canada Co.*, 142 Cal. 439, 76 Pac. 47.) And it is conceded by all the parties, except the defendant Verdugo.

The partition did not specifically deal with or dispose of the underground waters. The only right concerning them which is affected by it at all was the right to have them remain undisturbed for the preservation of the surface streams

undiminished, and this is a mere incident arising from the necessity of keeping the disposition of the surface flow effectual. There may possibly be a quantity of this underground water which could be taken without affecting the surface streams, even if taken above the point where the surface water is diverted into flumes or ditches. The defendants claim that there is a large amount thus available for use. All of the underflow, whether necessary to preserve the surface flow above or not, becomes available for such taking as soon as it passes below such points of diversion. The right to make use of all such surplus still belongs to the lands riparian thereto in the same manner as before the partition. The partition cut off from this right all lands of the ranch set off to the different parties in severalty, except those tracts which extended to some portion of the underground flow, but otherwise the right to the surplus was not affected by the decree. The underground water thus undisposed of is not to be distinguished, so far as legal rights thereto are concerned, from a similar surplus remaining in a surface stream after a partition had been made allotting certain parts thereof, less than the whole, to the use of the riparian owners. For illustration, suppose that in a partition of lands riparian to a surface stream of one thousand miner's inches, the amount of five hundred inches is allotted to the several tracts in fixed proportions. The right to the use of the five hundred inches not so apportioned, would, in such a case, as between those parties, still remain attached to the riparian lands as a riparian right, unaffected by the provisions of the decree fixing the proportions in which the parties are entitled to use the water expressly set apart to them. So in the present case the underground water was not set apart, and the available surplus thereof belongs, as before, to the riparian lands to be used by the owners in accordance with the law of riparian rights. The relative rights of the parties in this surplus are to be determined by that law, without aid from the partition decree. The fact that the stream above at some point in its course is divided into distinct channels does not affect the right of the lands below to share in the use of both or all of them. All of the lands concerned in this action, or practically all of them, are, it appears, alike riparian to the

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whole of the stream constituted by this underflow. For the determination of present rights to its use, it must be treated as constituting but one stream. Each parcel of land, therefore, is entitled to its proper share of the entire underflow, without regard to the question whether it comes from the underflow supporting the particular surface stream set apart for it by the partition, or from some other part of the underflow, always, of course, saving the proposition that no owner may, by extracting the underflow, diminish either surface stream to the injury of any party entitled to it. ✓

It is to be noted that the plaintiffs are not entitled by the decree to three-fourths of all the surface flow of the canyon, but only to three-fourths of the west-side stream and of the surplus of the east-side stream, when there is any. The court below appears to have adopted the view that the separation of the right to the surface streams by the partition accomplished a like separation of the right to all of the underground waters, both of the parts thereof necessary to sustain the surface flow and of the surplus. It made a finding attempting to designate on the surface of the ground a boundary line separating these two supposed underground streams, and declaring that the waters thereof, respectively, and the right to pump and use the same, belonged to the parties entitled under the partition to the respective surface streams. This declaration of right was not expressly stated in the decree, but some of the provisions thereof, as will presently appear, are obviously based upon it. In this theory the court was in error, and for this and other errors, to be presently discussed, the judgment and order must be reversed. Other points are presented in the record which may again be involved upon a new trial. We now proceed to the consideration of these propositions. ✓

2. The finding is that the underground flow in the canyon is in two separate and distinct streams, one giving rise to the east-side surface stream and the other to the two streams composing the west-side surface stream. The boundary line between them was declared to be the easterly line of a certain "inclosed field" mentioned in the partition decree. The evidence shows that the general course of this line is north and south, and it is located about midway of the bed of the ✓

canyon, and that it has many sharp angles, so acute, indeed, that it would be extremely remarkable, if not impossible, that there could be any natural impervious barrier having such a course. There is no evidence to indicate that there is any difference in the material of the bed of the canyon corresponding to this line, or anything therein that could thus divide or separate the underflow. The finding as to this line of separation was purely arbitrary and entirely without support.

The fact that the streams arose in different places and the circumstances that, as the dry years continued and the places where they arose receded farther and farther down the canyon, the line of these places followed the previous course of the respective streams, constitute some evidence that the density or permeability of the material of the parts of the canyon-bed corresponding to the previous courses of the streams is different from the adjacent parts thereof, and that the space between them is less porous than the lines of these streams. (There is no finding, however, and no evidence, that the separation is so complete that the pumping of water from one of them will not affect the flow, above or below the surface, in the other, and this is the vital point in the case.) It is unlikely that it is so, since wherever there have been explorations in the canyon beneath the surface, the material has been found to be practically homogeneous and equally permeable throughout. But as the right to the use of the surplus underflow remains undivided and the riparian rights of the lands below include the right to prevent undue interference with either branch of the underflow above, supposing that there are two or more branches, and as the Canyon tract extends to all of them, the question of the separation of the underground flow is of no consequence in the present stage of the case. ✓
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3. Driven by the necessity arising from the increased acreage irrigated, and the scant supply of water after the year 1892, many of the plaintiffs have been compelled to obtain water for their lands from wells sunk thereon. This water lies in the sands and gravels at a considerable depth beneath the surface, and, for the most part, appears to come from the underground flow of the canyon which goes under the

dam and spreads under the surface of the plain below. Some of it, of course, comes from rainfall below the dam, and some, it is claimed, comes from the Los Angeles river, but the water from these last-named sources is not material to the case, except, possibly, as it may affect the necessities of the particular party and thus assist in determining the amount he may be allowed to take of the waters of the canyon proper.

The court did not specifically find whether or not the amount of water pumped by each party was the proportion of the underground flow to which the particular party was entitled, nor did it determine whether or not any of that pumped above the dam constituted a part of the water which, as above stated, remains unpartitioned. It finds that none of the parties has ever taken or used more water than was reasonably necessary for the proper irrigation of his land, and that none has had enough for that purpose; but necessity is not the sole measure of right in such cases.

The decree does not attempt to declare the comparative rights of each party, nor to go into that question at all. It does not mention the rights of the several plaintiffs to pump below the dam nor in any manner fix the amounts they may take by that method. It is directed entirely to the rights of the defendants. It declares that the defendants Thom and Ross may each continue to pump and use the water from his wells below the dam, as heretofore; that E. M. Ross may use, upon his one hundred acre orchard in the Canyon tract, enough water from his upper well to make up, when added to his part of the surface flow of the east-side stream, a total flow of twenty-two and one-fourth miner's inches, but may not use a greater amount thereof on the Canyon tract under present conditions, and that he may use all the waters of said upper well, "and of said east-side stream, both surface and subterranean," upon any of his lands within the Canyon tract; that Verdugo may, as heretofore, pump thirty-five inches from his well; that C. E. Thom may pump from his east well, near the Verdugo well, and use the water upon his land in the Canyon tract, but not on other land; and that the waters, surface and subterranean, intercepted and diverted by the dam, are to be used upon the lands below the

Canyon tract, three-fourths by the plaintiffs and one-eighth each by defendants Thom and Ross.

These provisions of the decree are manifestly based on the theory that the entire flow of what the court calls the east-side stream both above and below the surface, east of the arbitrary division line established in the findings between the underflow of that and the west-side stream, belongs absolutely to the Canyon tract by virtue of the partition, if necessary for its irrigation. In view of what has been said, the decree is erroneous as to the surplus of the underflow, if any, in that it does not limit the right of each to his proper portion as compared to the rights of the other owners.

4. The well of the defendant Verdugo is not situated over what the court finds to be the east-side stream, but is well within the territory which it finds contains the underground waters of the west-side stream. With respect to the effect of the pumping of thirty-five miner's inches from this well upon the west-side stream and upon the underflow intercepted by the dam, the finding is that "the court is unable to discover from the evidence in this case that the flow of the waters at the said point of diversion and at the submerged dam is affected by the pumping of said well." If this was intended as a finding that the flow of water is not affected by the pumping from the well, the evidence does not support it. If intended as a declaration that a finding is excused by the want of evidence on the subject, it is unwarranted. From other findings it appears that this west-side stream has its source in the mountains above, is fed by water from that watershed, and flows underground in the upper part of the canyon down to the places where it appears on the surface; that it first appeared on the surface in the said "inclosed field" at a point less than one thousand feet below the Verdugo well, and that during the last ten or twelve years preceding the trial, which was in December, 1903, its place of appearance on the surface had gradually dropped farther and farther down the canyon a total distance of over a mile and a half, and that its flow had constantly decreased in quantity, so that it became insufficient for the needs of those to whom it was allotted. The evidence indicates that the total natural flow of the canyon, above and below the surface is

less than two hundred miner's inches. This well is about one hundred and sixteen feet deep, the bottom being in coarse gravel containing an abundance of water, and after reaching a depth of twenty-seven feet, it passes through similar water-bearing material all the way to the bottom. It would scarcely require the evidence of experts to prove that a well sunk in the sand and gravel of an underground stream of this character, a thousand feet or less above the point where the stream originally issued upon the surface, and pumping a constant flow of thirty-five miner's inches would, to some extent, reduce the flow of the surface stream. Especially would this effect follow where the surface stream and the underground flow is as small as in the present case. Hydraulic engineers of admitted qualifications did testify, however, in effect, that the pumping of that quantity from the well would materially reduce the surface stream, and that, taking the underground and surface flow as a whole, its amount would ultimately be reduced by an amount equal to the quantity pumped from the well, if none of it were returned to such stream. This, in the absence of extraordinary circumstances, not proven, and not to be presumed, is self-evident. There were other circumstances also tending to prove that the pumping of Verdugo's well affected the flow of water below. There is no evidence at all indicating that it would not or did not materially reduce the flow. It is true that when the pumping began it did not at once have a perceptible effect on the surface stream; but this delay was to be expected. It also appears that from 1892 to 1903 there was a scant rainfall, and that the flow of the stream was greatly diminished by the drought. But neither this natural decrease nor the fact that the effect of the pumping upon the flow must necessarily have been gradual makes it any the less inevitable that the taking of the water from the stream by the well above will eventually reduce the amount that would otherwise flow in the stream below, to the extent that the water so taken therefrom is not returned thereto. This is the necessary effect of any diversion from a stream, whether flowing on the surface or beneath, whether in an unobstructed channel, or in the gravel and sand which partly fills the rocky gorge of its original course. From the evidence the court

should have found whether it did reduce the surface stream, and if there was a reduction it should have been ascertained, as nearly as it could from evidence before it, the amount of such decrease. The defendant Verdugo should have been enjoined from decreasing the surface flow of the west-side stream and from taking more than his share of the surplus underflow, unless as Verdugo claimed, there was an estoppel against the plaintiffs which prevents them from asserting their rights in that respect. The court found that there was such estoppel. This proposition and also the claim that plaintiffs are estopped as to the upper well of E. M. Ross, and that they are barred by laches as to both of these defendants, will be presently considered.

5. The court finds that the amount of water diverted by the submerged dam is greatly diminished, and that this decrease "is largely, if not wholly, due to the many years of continuous drought." It further finds "that the fluctuations in the quantity of water flowing at the submerged dam into the common works has been considerable for several years past, but the court cannot determine from the evidence in this case that such fluctuations have been due to any extent, or, if any, to what extent, by reason of the pumping of the water from the upper well of Judge Ross." Another finding states that "it is impossible to determine" to what extent, if at all, the decrease aforesaid has been caused by the pumping of the upper well of E. M. Ross. These findings and those to the same effect concerning the Verdugo well are the only findings in response to the issue made upon the allegation of the complaint that the defendants have put down wells and have taken out water from the stream that belongs to the plaintiffs.

It may be conceded that it would be impossible to determine accurately the exact amount of the water pumped from this well that if not so pumped would have reached the pipes at the submerged dam. But it is not necessary, in order to establish the right to an injunction, that the plaintiff should be able to prove the extent of his injury with absolute precision. If the taking of the water by the defendants is a wrongful taking of that which belongs to the plaintiffs, and is of a substantial quantity and causes them substantial injury, the court is not excused from making any finding on

the subject by the fact that the evidence is indefinite as to the exact quantity taken, or the exact amount of the injury.

The evidence was that there had been continuous pumping from this well of a stream of water varying from sixteen to twenty-six miner's inches. The well penetrated, to the depth of one hundred feet, into the strata of water-bearing sand and gravel of which the bed of the canyon is composed. It was situated about one thousand feet above the dam. That the strata of sand and gravel pierced by the well, and from which the water was pumped, extended from the well, down the canyon, to the dam, was fairly established, and there is nothing in contradiction. The evidence referred to, and stated in the discussion of the effect of the pumping of the Verdugo well upon the underground surface flow, is equally applicable here. It was shown that all the underground water of the canyon, which did not rise to the surface, flowed slowly down the canyon underground, and had no outlet other than the narrow gorge across which the dam was constructed. The fact that there were fluctuations in the quantity flowing, before as well as after the pumping began, and the fact that dry seasons diminished the flow at the dam, do not disprove the fact that the taking out of water above also diminished it. From the evidence it is practically certain that the pumping of this well, as stated, would materially reduce the underflow at the dam. The court should have made a definite finding upon this issue. . . .

The facts stated are not sufficient to create estoppels against the plaintiffs. It does not appear that either Verdugo or Ross was induced to put down his well by any act, word, or tacit encouragement of the plaintiffs, or either of them, or relied upon their silence as evidence of his own right, or of their consent. Nor does it appear that plaintiffs intended that either should act in reliance upon their silence, or expected that either would do so. It is not shown that plaintiffs were under any duty toward either to disclose any claim they might have to the water, nor that said defendants did not know, at least as well as the plaintiffs knew, that the pumping of the respective wells would decrease the west-side stream, and the underflow at the dam. The party estopped must always intend, or at least must be so situated that he

should be held to have expected, that the other party shall act, and the other party must, by the words, conduct or silence of the first party, be induced or led to do what he would not otherwise do. (*Carpy v. Dowdell*, 115 Cal. 677, 47 Pac. 695; *Swain v. Seamans*, 9 Wall. 274, 19 L. ed. 554; *Dickerson v. Colgrove*, 100 U. S. 580, 25 L. ed. 618.) The mere fact that the defendants expended money in sinking the wells and putting in the pumps each upon his own land, with the knowledge of the plaintiffs and without objection by them, creates no estoppel. . . . If the finding that the Verdugo well was sunk and the money expended with their "acquiescence," means more than a passive acquiescence or failure to object, it would be contrary to the evidence. (A mere passive acquiescence where one is under no duty to speak does not raise an estoppel.) . . .

It is suggested that, although the facts found may come short of creating an estoppel, they are sufficient to show that the plaintiffs are barred by their laches. (It is well-established doctrine that the defense of laches does not rest entirely upon lapse of time, nor require any specific period of delay, as does the statute of limitations.) In order to constitute laches, there must be something more than mere delay by the plaintiff, accompanied by an expenditure of money or effort on the part of the defendant. It must also appear that it will be inequitable to enforce the claim. "The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect." (*Penn Mutual L. I. Co. v. Austin*, 168 U. S. 698, 18 Sup. Ct. 228, 42 L. ed. 626.) It is said that the cases on the subject "proceed on the assumption that the party to whom laches is imputed has knowledge of his rights and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that, because of the change in conditions during this period of delay, it would be an injustice to the latter to permit the" claimant now to assert his rights. (*Galliher v. Cadwell*, 145 U. S. 372, 12 Sup. Ct. 874, 36 L. ed. 738.) "The acquiescence which will

bar a complainant from the exercise in his favor of the discretionary jurisdiction by injunction must be such as proves his assent to the acts of the defendant, and to the injuries to himself which have flowed, or can reasonably be anticipated to flow, from those acts." (*Lux v. Haggin*, 69 Cal. 271, 10 Pac. 674, 4 Pac. 919.) The same case quotes approvingly this passage from *Rochdale etc. Co. v. King*, 2 Sim., N. S., 89: "Where one invades the right of another, that other does not in general deprive himself of the right of seeking redress merely because he remains passive, unless, indeed, he continues inactive so long as to bring the case within the purview of the statute of limitations." The evidence shows that the acquiescence of the plaintiffs in the sinking of these wells and the pumping thereof was nothing more than a mere failure to actively interfere. The consent of plaintiffs was not asked; nor were they informed by either defendant of the intention to sink the wells, expend the money, or pump the water. There was nothing in the circumstances to put upon the plaintiffs any duty or obligation to inform either defendant that the pumping of the water would be, or was, a violation of plaintiffs' rights. Verdugo well knew, from the former action against him, that plaintiffs did object to any diminution of, or interference with, the west-side stream. The court finds that the plaintiffs, during the time the Verdugo well was being pumped, claimed that it was depleting their own supply, but it does not find that they, for a moment, assented to the injury thus caused. The evidence shows that there was no such assent. While these defendants were sinking the wells, erecting the pumps and laying the pipes, the plaintiffs had no information from them, or, so far as appears, from any other source, as to the amount of water they proposed to pump. During that period they were certainly not required, by any rule of law or equity, to inform him that he incurred the expense at his peril, if the subsequent pumping should invade their rights. Each defendant was conducting his operations upon his own land. The expense was complete when the pump was erected and the pipes laid. That expense was not incurred in reliance upon any word or act, nor upon the silence, delay or tacit encouragement of plaintiffs. Up to the point of the completion of the works there

could be no laches. After that completion there was no change of conditions, or, at all events, none that would make it unjust for plaintiffs to assert their rights. The subsequent events consisted wholly of the continuous pumping of the wells, to the depletion of plaintiffs' source of supply, and to the profit and advantage of the defendants, respectively. They were not induced to pump the water by the delay of plaintiffs to prevent them, nor was either of them thereby induced to believe that plaintiffs had no right in the water he was pumping, or that, if they had such right, they had abandoned it. (As presented by the evidence, the case is simply this: that each of said defendants was urged solely by his own extreme necessity, not relying on the act, omission, or word of anyone, and that, while he doubtless hoped that plaintiffs would not interfere, he proposed to continue, regardless of the effect upon their supply, until they did prevent him.) Each may have believed that plaintiffs had no such right, but such belief sprang from no act, word, silence, or delay on their part. The necessary elements are wholly wanting, and therefore the defense of laches is not established.

7. It is claimed on behalf of the defendant E. M. Ross that the pumping of his upper well takes water only from the underflow of the east-side stream, and does not affect the water of the west-side stream, nor the underflow thereof, and, hence, that it is within his legal rights. Under the partition decree he is entitled to the use of the east-side stream upon his land in the Canyon tract, but as to the underflow thereof, his right under that decree, as we have heretofore stated, does not extend to its use, but only to have it remain to preserve the surface flow. As to the use of the unpartitioned surplus underflow for irrigation, he is entitled only to his proportionate share with the other parties, including the plaintiffs.

It is declared by the judgment in the case at bar that the plaintiffs and the defendants C. E. Thom and E. M. Ross are entitled, as tenants in common, in the proportions heretofore stated, to all the waters of the west-side stream and all the waters intercepted by the submerged dam, which, of course, includes, in part at least, the underflow of both the east-side and west-side streams. Nevertheless, E. M. Ross is

given the right to pump his upper well and to thereby decrease the underflow from the east-side stream at the dam. It is contended by the plaintiffs that he is estopped and cannot be allowed to pump water to the extent that it will affect such underflow, even if he uses no more than his reasonable share. This estoppel, it is claimed, arises out of certain transactions between him and the plaintiffs, which it becomes necessary to state.

About the year 1893, when the water began to run short, the plaintiffs and the defendants Thom and Ross, being jointly interested in the west-side stream, began to look about for means by which the common supply could be increased. Up to about May, 1894, the talk had been confined to proposals to make a more perfect dam to catch the surface stream. It was believed by all of them that there was a considerable amount of water flowing underground down the canyon through the narrow gorge, below the places where the surface streams were then diverted, and that by constructing a dam across this gorge to the solid ground on each side, and extending it below the surface to bedrock, all of this underflow could be intercepted and added to their common supply for their lands below. On May 14, 1894, which was about the time of the first mention of the project to construct a submerged dam, E. M. Ross wrote to the secretary of the plaintiff company, referring to previous suggestions of a dam for surface water, and saying: "I was told yesterday and the day before that your company is now talking of putting down a submerged dam somewhere in the canyon. That, of course, is an altogether different thing, and involves the development of water not rising in the old field of the partition decree and not of the surplus of the Teodoro Verdugo water. If it is desired to develop water on my land, perhaps terms may be agreed upon; but otherwise not." The water of the "old field," means the west-side stream and the "surplus of the Teodoro Verdugo water," the surplus of the east-side stream. On May 25, 1894, the plaintiffs wrote a letter to E. M. Ross, saying that it was their desire "to obtain the cooperation of yourself and Captain Thom in the construction of such works as are deemed advisable on the land owned in common by the owners of the waters flowing from Verdugo

Canyon, for collecting all such waters, flowing below as well as on the surface, and conducting the same to our common use." This evidently referred to lands to be thereafter purchased in common, for, at that time, there was no land "owned in common." It is clear from this and other evidence, that the plan in contemplation during the subsequent negotiations was the plan above stated, or some similar plan to accomplish a similar result. Soon after this, negotiations began with Teodoro Verdugo, the owner of the land considered best for a site for the proposed dam, looking to the purchase of a tract of 9.39 acres, for \$4,000, but the price proved to be too high for the means of the company and that purchase was abandoned. In all the negotiations and transactions concerning this submerged dam it was understood that it was to be a common enterprise, that the property necessary therefor should be held, the expense thereof contributed, and the benefits thereof shared in the same proportions; that is, in the proportion of three-fourths to the plaintiffs and one-eighth each to Thom and Ross. Shortly after the 9.39 acre purchase was dropped, E. M. Ross obtained a contract from Verdugo to buy on his own account a tract of 58.87 acres, including part of the 9.39 acres, and, in connection therewith, an option from Verdugo for the purchase of a tract of 7.81 acres, being the westerly and remaining part of the 9.39 acres, at the price of \$2,500. He asked the plaintiffs and Thom to join with him in buying this 7.81 acres at that price, as a site for the dam previously proposed. This tract did not extend entirely across the canyon to the east side, or to solid ground, but only to the easterly bank of the wash. The plaintiffs objected on this account, and wanted to have the tract extended easterly to the railroad track, to which the defendant refused to accede. Thereupon a meeting was arranged at which all the interested parties were present or represented.

At this meeting it was agreed that the 7.81 acre tract should be purchased, and that E. M. Ross should give a right of way from the easterly line of the tract through his 58.87 acre tract to solid ground on the east side of the canyon, as a part of the site for the dam. Opposite the lower part of the 7.81 acre tract a small side canyon from the east joined the main canyon, and at the junction there were evidences

of water. This the defendant Ross wanted to hold for his own use, and for that reason he stipulated that the dam should be placed not more than one hundred feet south of the north line of the 58.87 acre tract. The agreement was carried out and the grant of the right of way executed on September 5, 1894.

The court finds that at this meeting "it was feared that there might be some difficulty in the development of water on this 7.81 acre tract alone, by reason of the fact that the construction of a dam, submerged, might have the effect of turning the waters around the east side of the dam, and thereby escape without being brought to the surface." The dam was a considerable distance below the junction of all the surface streams, and no separation of the underflow into parts corresponding to the respective surface streams was then suggested. All present must have understood that a dam across the canyon to solid ground on each side would bring to the surface all the underflow in both tracts of land, that through which the right of way extended as well as the 7.81 acres. Nothing was said about any division of these waters so as to give to the common owners the water from their tract, and to E. M. Ross that from the right of way. He did not at that time, nor until long after, say or suggest that, when the dam was extended upon the right of way, he would own, or would claim, the water coming directly from the right of way, for his exclusive use. It was not suggested by anyone that any part of the water to be obtained by the common works, when completed, should be devoted to any other than common use, or be other than common property. It is quite clear, however, ✓ from all the evidence, that the plaintiffs understood that all the water obtained was to be owned and used in common, and that Judge Ross, on the other hand, understood, or believed, that the water coming to the dam through his 58.87 acre tract would belong exclusively to him, and that all other water obtained would be common water. It is also manifest that none of the parties was aware of the understanding of the other on this point, that each supposed that all understood it as he understood it, and that each was acting in perfect good faith, without intent to deceive, defraud or mislead the other party to the arrangement.

The work on the dam was begun in 1895, and was vigorously prosecuted during that season. On September 30, 1895, the excavation had reached the land of Ross, and had disclosed considerable underflow coming from his land. He then stated to the plaintiffs that it would be necessary to "guard against taking any water that might be developed" on his land. Several thousand dollars had then been expended in the work. About the first of August, 1896, he made a definite claim that the water "developed on his land," as he expressed it, belonged to him exclusively and not to the common owners, regardless of its amount. The plaintiff company, according to the arrangement between the parties, was in charge of the work. Immediately upon this claim being made, the work was stopped in order to come to a settlement of the matter. At that time the dam was completed for a distance of two hundred and ten feet at the west end, and the excavation had been made from the east end of the completed part easterly across the 7.81 acre tract and some sixty feet into the land of E. M. Ross, and of a depth varying from thirty to forty-five feet. After considerable negotiation, on August 3, 1896, he made a written waiver of any claim he might lawfully have to the exclusive use of this water and agreed to claim only a one-eighth of the whole thereof, in common with the others. The work was then resumed, and a substantial amount of expenditure was made upon it, after this waiver. It was never completed, but it has the effect of intercepting from thirty to forty miner's inches of water in addition to the surface flow. From the inception of the work upon it until the beginning of this action the defendant Ross has regularly received one-eighth of the water obtained thereby, and has paid one-eighth of the expense of maintaining the dam and operating the common works.

Shortly before the trial of the case in the court below, in ✓ December, 1903, he discovered that at the time he made the written waiver of August 3, 1896, giving up any right he might have to the exclusive use of the water, he had forgotten the fact that on August 14, 1894, a day or two before he began to negotiate with Verdugo for the purchase of the 7.81 acre tract for common use, the plaintiffs had written to him a letter stating that they could not raise the money to pay

their share of the price of the 9.39 acre tract previously proposed, the negotiations for which had been left in his hands, and that they had abandoned the intention of joining in the purchase. The waiver was made upon the receipt of a written statement of the plaintiffs, purporting to be a history of the negotiations from May, 1894, up to the execution of the right of way, in September, but this letter was omitted, and although it had been all the time in his own possession, he had completely forgotten it, until, in looking over his correspondence preparatory to the trial, he found it. His testimony was that, having forgotten that the plaintiffs had abandoned the proposed joint acquisition of a dam site, the history made it appear to him that while he was intrusted with the negotiations for the 9.39 acre tract he had taken a smaller tract instead, and thereby obtained an advantage for himself, and that, not wishing to appear to occupy such a position, he waived his rights, but that if he had then remembered the letter of the plaintiffs abandoning the enterprise, or the fact that they had abandoned it before he took up the negotiation on his own account, he would not have made the waiver. The court found that he was not estopped by the giving of the right of way in 1894, nor by the waiver of 1896, from pumping water from his upper well and thereby depleting the supply at the dam. ✓

The conclusion that he was not estopped by the waiver of August 3, 1896, alone was clearly correct. It had been given under a mistake of fact, and but for that mistake it would have been withheld. His failure to recall the fact of plaintiffs' withdrawal from the scheme was not that degree of neglect that would bind him to stand by the waiver, notwithstanding the mistake by which it was induced. ✓

The question whether or not he is estopped by the execution of the grant of the right of way, the circumstances upon which it was given, and the subsequent action of the plaintiffs on the faith of it, presents greater difficulty. He had the right to take out water by wells or otherwise of the surplus underflow of the canyon to the extent of his reasonable proportion thereof, for use upon his lands in the canyon tract, provided he did not thereby injuriously affect the

surface flow of the west-side stream. The plaintiffs were fully aware of this right. His offer of an interest in the 7.81 acres, with the right of way, was practically an offer from him to them. It was substantially the offer of an opportunity to carry out the original plan at less cost, and it was so understood. The plaintiffs were thereby induced to accept and pay for a three-fourths interest in the site and to pay three-fourths of the cost of the works constructed thereon. The whole object, so far as the plaintiffs knew, and he stated nothing to the contrary, was to add the water of the underflow to be collected by the dam, including the underflow of the east-side stream, to the waters of the west-side stream, set apart for use on the lands below. He was a tenant in common with them in the west-side stream.

If, under all these circumstances, it was a part of his design to induce them to aid, to the extent of three-fourths of the cost, in the erection of a dam to intercept all the underflow, in which, as it was then flowing at that place, all were entitled to share, in order that, by means of that dam, he could obtain for his own exclusive use all that part of the water that might flow out of the land through which he was to grant the right of way; if he proposed to secure this advantage from their efforts and expenditure in the common work, the principles of equity and justice, and the relations existing between them, demanded of him a full and frank disclosure of his purposes and claims. He had no right to remain silent in the belief that they understood the matter as he did. One who is embarking with others in a common enterprise to use common property for the common benefit, at common expense, owes to the others the duty, if he proposes or intends to reserve a part of the benefit to himself exclusively, to inform the others fully in regard to it. If he does not, he will be estopped to assert his claim after the others have incurred the expense.

This seems to have been the view of the court below with regard to all the underflow that actually reached the dam; for it declared all those waters to be subject to the common ownership, in the proportions stated, for use on the lands below. We are of the opinion that the estoppel does not apply to the claim that he has the right to take by means of

pumps in the canyon above, his reasonable share of the underflow, for use on his lands on the Canyon tract. . . .

All these authorities agree that no estoppel can exist unless the party invoking it was led to place himself in the prejudicial position, in part, at least, by his own ignorance of the rights of the other party, his own lack of knowledge of the true state of the title. This element is entirely wanting in the present instance. The plaintiffs knew that E. M. Ross owned land in the Canyon tract, that he had a large orchard thereon above the proposed dam, which required water, and that he had the right to use thereon a due proportion of the underflow of the canyon. They may have supposed and believed that he did not intend to exercise that right, but they were not led to that belief by any act or word of his. His conduct in entering into the work with them to obtain the underflow at the dam for use on his lower lands, which were entitled to a share thereof, was not inconsistent with his right to take, from the same flow above, the share of the water to which his upper land was reasonably entitled. He could not obtain the water from the dam for use on the upper land, and he said nothing to indicate that he would not obtain it by other means, if the upper land required it in the future. (As the plaintiffs acted with full knowledge of his right, and without any promise or representation by him that he would not exercise it if occasion arose, he is not estopped to pump water from his upper well, for use on his part of the Canyon tract, to the full extent of the share due to that land. ✓

8. The appeal of the defendant E. M. Ross is from that part of the judgment fixing his right to pump water from his "upper well," which limits the amount he can pump to twenty-two and one-fourth miner's inches, and forbids him from using it elsewhere than on the Canyon tract. What has been said sufficiently disposes of the questions presented by this appeal. Under the partition he is given only the right to the surface flow of the east-side stream. With regard to the available unpartitioned underflow, he is entitled, as a riparian owner, to his reasonable share thereof and may use it upon any of his riparian land in the Canyon tract. In regard to his right to take the underflow, by means of a pump,

from his land above the dam for use upon his lands below, his riparian rights are modified by the estoppel existing against him by reason of the facts referred to in the preceding subdivision of this opinion. As we have said the dam was built to intercept all this underflow and devote it to use on the lower lands, and he, no more than the other parties interested, should be permitted to take out water from the underflow above the dam for use on the lower lands, to a sufficient extent to decrease the amount thereof that will flow to and be intercepted by the dam. If any can be taken out without producing that effect, he and the other owners of riparian lands below are each entitled to a reasonable share thereof.

9. In conclusion it is necessary to give some directions relating to a new trial. If pumping is allowed without check, above the points of diversion of the surface streams, it is practically certain that those streams will cease to flow. It is by no means certain that the pumping now going on below those points does not exceed the average normal flow of the underground stream, that it is not in fact a process of exhaustion, so that in a few years of use at the same rate, even that supply will fail. (No party above or below the dam ✓ should be allowed to take by such process more than his reasonable part of the available surplus, if such taking affects the surface streams, or prevents another party from obtaining his reasonable share. (And no party, of those entitled to ✓ use the water collected by the submerged dam, has the right to pump water above the dam for use on his lands below, if such pumping decreases the flow at the dam. The only just method of adjusting the rights in this surplus of the underflow is to ascertain, as near as may be, the total average amount thereof available for this use, and the amount required by each party when used as economically and sparingly as may be reasonably possible, and, upon this basis, apportion to each his due share. In this calculation, the amount of underflow collected by the dam should be included as a part of the whole available surplus underflow, and the portions of that water delivered to those interested in the dam, not including the surface flow there distributed, are to be charged to said parties, respectively, against their share

of such underflow. Also, those who are now pumping water of the underground stream above or below the dam must be charged therewith as part of their shares and the amount pumped computed as part of the whole supply to be apportioned. It is certain that there will be no surplus, and it may turn out that some are pumping or receiving more than their share. It appears that, in some instances, several persons use a common pump. There can be no objection to this, if all of them are entitled to receive some amount and receive only their due. In the case of the diversion of a surface stream, the portions allotted to the respective parties, and the whole flow of the stream, can be readily measured, and a fair division of such waters may easily be made self-executing by the mere device of giving to each a fixed proportion of the whole, instead of a certain quantity of water, so that, although the total quantity in the stream may vary, the rule of division will remain constant. But this cannot well be done where different persons, each upon his own land, and by means of his own pump, is taking a proportion of an underground stream. In such a case the parties would not be able to agree upon the total amount available of the underground supply, and there would be no means of accurate measurement to settle their differences, as in the case of common shares of a surface stream. A decree merely fixing the proportion of the underground supply to which each was entitled would be of no benefit, for it would not enable either party to know the amount which he could pump. The total supply can only be determined by the court after a consideration of such evidence as it can obtain on the question. It will be necessary for the court to determine from the evidence the total amount of the underflow available for a division and to determine the share of each by fixing a positive quantity which each may take as his proper proportion of the whole.

The judgment and order are reversed, with costs of appeal in favor of plaintiffs.

Percolating Waters—Use on Distant Lands—Overlying Land Owner's Rights—Appropriator's Right to Surplus.

JOHN BURR, Appellant, v. MACLAY RANCHO WATER COMPANY, Respondent. H. R. HILLE et al., Interveners and Respondents.

(154 Cal. 428, 98 Pac. 260.)

SHAW, J.—The plaintiff sued to enjoin the defendant company from pumping water from its wells on land adjoining that of plaintiff and transporting such water to distant lands for irrigation and use on such remote lands. The interveners own some of this remote land and claim rights to receive the water pumped by the defendant, under contracts made with defendant to furnish them with water for use on their respective tracts of land. The plaintiff has wells on his land, from which he pumps water sufficient for irrigation and other uses thereon, and the injury he complains of is the lowering of the water underneath the surface, caused by the pumping of the defendant's wells, whereby his wells are drained of water. The court, upon the facts found, concluded that the plaintiff was entitled to pump from his wells, for irrigation of one tract of his land containing forty acres, designated as block 191, for six consecutive days of twenty-four hours each, in each month, a constant flow of twenty-five inches of water, miner's measure, measured under four-inch pressure, that during this period the defendant had no right to pump any water, and that, during the intervening time, the defendant has the right to pump water from its wells and carry the same to distant lands for sale and use thereon, to the amount of one hundred and twenty-five miner's inches, constant flow. The interveners claim, and were declared entitled to claim, solely, under the defendant. Judgment was given in accordance with these conclusions. The plaintiff appeals from the judgment upon the judgment-roll alone.

The lands of the plaintiff consist of three tracts, designated respectively as blocks 153, 190 and 191 of the Maclay Rancho Ex-Mission San Fernando, according to the recorded plat thereof, and embracing ninety acres. His wells are situated

on block 191, which is practically all set out in fruit trees requiring irrigation. Until shortly before this suit was begun he had not irrigated the other tracts. The main controversy concerns the rights pertaining to block 191, but the plaintiff also claims the right to pump water from his wells on that block to irrigate the lands of the other two blocks if he should find it convenient to do so. He did for a short time irrigate fifteen acres of block 190. The plaintiff claims that, upon the facts found, the court erred in limiting at all his right to take water by means of his pumps, and in adjudging to the defendant the right to take water from the adjoining lot by means of pumps, or otherwise than by the natural artesian flow of the wells, or to a greater extent than thirty inches of constant flow.

The lands of the plaintiff and a part of block 192 are all situated over the same body of underground percolating water. Concerning this body of water the finding is that underneath all the said lands, and extending to the foot of the mountains, three or four miles northerly thereof, are water-bearing strata of varying depths of sand, boulders, and coarse material, and lying over each stratum is an impervious stratum of clay or cement, extending toward, but not entirely to, said mountains; that across the said strata and running through the southerly portion of block 192, which lies immediately south of block 191, there is dike of material impervious to water; that the subterranean waters in the water-bearing strata are supplied by rains falling on the mountains to the north and east which, descending the surface of the mountain slopes to the base of the mountains, there find their way into the coarse material and from thence into said water-bearing strata, through which they percolate underneath the overlying strata of clay or cement and under the lands of plaintiff and the northern portion of block 192, "down to the said dike, by means of which the movement of the said water is arrested, and the waters impounded, forming a subterranean basin wherein the said subterranean waters are retained." The seven wells of the defendant are all situated on the part of block 192 north of this dike, and pierce the said water-bearing strata and subterranean basin. The water pumped therefrom is all taken away to lands lying south of

the dike, a large portion of it being several miles distant therefrom and none of it overlying the subterranean basin aforesaid. The lands of the interveners lie from two to four miles south of said dike.

The plaintiff acquired block 191 in 1886 and ever since January, 1887, he and his family have resided thereon. In that year he began planting orchards thereon and gradually increased the area thereof until 1897. In 1896 he bored five wells along the southern line of the block and put a pumping-plant therein, from which, until the defendant began to pump on block 192 in June of the year 1902, he pumped water to the amount of twenty-five miner's inches for six full days consecutively each month, using the same to irrigate said block, and the same being necessary for that purpose. This water was taken into his pumps in the wells at a depth of twenty-four feet below the surface, and it appears from the findings that his wells and pumps, as constructed, cannot take the water at a lower depth. He has no other water supply and the water is, of course, necessary to prevent the destruction of his orchards.

In June, 1902, the defendant began pumping from its wells on block 192, over the basin aforesaid, about one hundred and twenty-five miner's inches of water, and, until the suit was begun, continued to do so, transporting the water to the distant lands above mentioned and there distributing the same for irrigation and other purposes. Prior to this excessive pumping the water in plaintiff's wells had usually stood at a general level of nine feet below the surface. The consequence of the operation of the defendant's pumps as stated was that during the remainder of the year 1902, while the pumps were so operating, the level of the water in plaintiff's wells was reduced to twenty-seven feet, and during the year 1903 to thirty feet below the surface. The trial occurred in May, 1904. At such times as the defendant did not operate its said pumps the water level in plaintiff's wells stood at fourteen feet below the surface in the year 1902 and at sixteen feet in the year 1903. While the defendant is operating its pumps it is impossible for the plaintiff to obtain any water from his wells by means of his pumps.

(It is necessary to consider, briefly, certain contracts mentioned in the findings. All the land affected by this action is included in a tract of twenty thousand acres formerly owned by Charles Maclay, from whom all the parties and all the owners of lands to which the defendant supplies water from its wells, derive title. On September 9, 1885, Maclay conveyed this tract to five trustees, who were to subdivide and sell it. They were to expend, and did expend, twenty thousand dollars in subdividing and marketing the land and in constructing dams, reservoirs, and conduits and in boring artesian wells. In the fall of 1885 they bored the seven wells aforesaid and obtained an artesian flow of thirty miner's inches of water therefrom, which, with water from other sources, they thenceforth distributed to some of the lands in the tract. From these wells the defendant is now pumping the one hundred and twenty-five inches in controversy. In all the deeds made by the trustees, including those to the plaintiff and the interveners, there was a clause reserving to the grantors "All artesian water that may be developed on said land, and not used thereon." The defendant has succeeded to all the rights of the trustees in the water thus reserved.

Some importance seems to have been attached to this reservation in the court below, but we do not think it affects the rights in controversy in the case. It does not extend to the artesian water that may be necessary for use on the land from which it may be obtained, nor to any water except artesian water. It reserved no right to enter on the land to develop artesian water. Conceding that the word "artesian" has the meaning sometimes given to it, and refers to underground water which, by reason of pressure, will rise above its natural level, though not to the surface of the ground, when the stratum in which it lies is pierced by a well, the reservation does not restrict the right of the plaintiff to take such water from the underground strata and use it on his land, situated as it is, over the strata. This is all that the plaintiff claims. The only limitation it would appear to impose is that where different blocks are obtained by separate deeds, each containing this reservation, it does not, in terms, give

the owner the right to take water from the basin by wells situated on one of his blocks and use it upon the other. If the first tract had, and the second had not, underground water of the kind reserved, this would clearly be a substantial violation of the rights reserved. But the plaintiff's respective blocks of land are all situated over the basin in question, and each block is entitled to sufficient water from the basin for the necessary use thereon. The taking of it all by means of wells on one lot, instead of boring wells on each and obtaining for each the necessary water from its own well, would be a mere technical and wholly unsubstantial departure from the terms of the reservation, unless some special injury results from the location of the respective wells. If the pumping by the plaintiff of all the necessary water for his three blocks from the wells on block 191, so near to the defendant's wells, would materially lower the water level in its wells, there might be the substance of an injury to the defendant. But the findings show that the lowering of the water level is caused by the excessive pumping of the defendant and not by the pumping done by the plaintiff. Even the simultaneous pumping of twenty-five inches by the plaintiff and a considerable quantity by the defendant, the amount not being stated, but presumably as much as the original thirty inches, which was customary prior to June, 1902, did not materially affect the water level. But at all events the most that the defendant could claim is that the plaintiff be required to take upon each block, separately acquired, the water used thereon, if the other method proves injurious.

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With respect to plaintiff's blocks 153 and that part of 190 upon which he has not used the water, but upon which he claims the right hereafter to use it, a question is presented which was expressly left undetermined in *Katz v. Walkinshaw* and which was not therein involved. The plaintiff, with regard to this land, stands in the position of the second class mentioned in the above quotation. The plaintiff, when the defendant began pumping the one hundred and twenty-five inches in June, 1902, gave it notice that the pumping was lowering the water level and impairing his rights. The suit was begun in July, 1903, and the facts found by the court

show that no estoppel *in pais* exists in favor of the defendants to prevent the plaintiff from asserting, protecting, and enforcing such rights as he may have to the water for use on blocks 153 and 190. The question is therefore fairly presented whether or not, after an appropriator of water from a common water-bearing strata has begun to take the water therefrom to distant lands not situated over the strata, for use on such distant lands, the owner of other overlying land upon which he has never used the water, may invoke the aid of a court of equity to protect him in his right to thereafter use such water on his land, and thus prevent the appropriator from defeating such land owner's right, or acquiring a paramount right, by adverse use, or by lapse of time. It appears from the findings that the existence of this underlying water was known before the lands were conveyed to the trustees by MacLay, and that the plaintiff bought his tract from the trustees because of its situation with respect to that water and relying upon said natural water supply, and that without this water the land is of little value. Under these circumstances it does not seem reasonable or just to adopt a rule that would deprive the buyer of such land of the principal benefit of his purchase and the land of its chief element of value. The land being so situated that it has the natural advantages afforded by the underlying water, the conditions are analogous to those affecting land riparian to a stream, which, because of its situation with reference to the stream, is given rights to the waters thereof, so far as necessary for use thereon, which are paramount to the right of another riparian owner to divert the water to lands not riparian. (The reasonable rule here would be to hold that the defendant's appropriation for distant lands is subject to the reasonable use of the water on lands overlying the supply, particularly in the hands of persons who have acquired it because of these natural advantages, and we therefore hold this to be the law of the case with respect to the lands upon which no water has been used by the plaintiff. *law*)

In the case of either class of owners of overlying lands, the appropriator for use on distant land has the right to any surplus that may exist. If the adjoining overlying owner does not use the water, the appropriator may take all the

regular supply to distant land until such land owner is prepared to use it and begins to do so. It is not the policy of the law to permit any of the available waters of the country to remain unused, or to allow one having the natural advantage of a situation which gives him a legal right to water to prevent another from using it, while he himself does not desire to do so. The established and settled law of riparian rights in running streams, which have become vested rights, may compel a different rule with regard to such waters in some instances, but these rules of law do not, of necessity, control rights in percolating waters. The most that should be allowed in such circumstances is to give a party the aid of the courts to protect his right and prevent the destruction of his source of supply by excessive use or other cause. The court unquestionably has power to make reasonable regulations for the use of such water by the respective parties, fixing the times when each may take it and the quantity to be taken, provided they be adequate to protect the person having the paramount right in the substantial enjoyment of that right and to prevent its ultimate destruction.

The judgment of the court below, with respect to block 191, was apparently based upon the rule established in *Katz v. Walkinshaw*, 141 Cal. 116, 135, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, and was made with the design to allow the defendant to take as much of the water, and no more, as should be compatible with the paramount right of the plaintiff. In view of the findings, however, we think the judgment, in its present form, might eventually prove insufficient for the protection of plaintiff's right. The watershed supplying the underground strata is of limited area, and in some years but little water is contributed to the subterranean basin, because of the light rainfall. The effect of the defendant's pumping for a period of a little over eighteen months was to lower the permanent water level, as it stood when the pumps were idle, as much as seven feet. By reason thereof the plaintiff is compelled to lift the water seven feet higher than before the defendant began its present appropriation. Perhaps, in view of the extreme necessity for water and the great benefit derived therefrom, this additional burden upon the plaintiff may not be unreason-

able. But if the judgment permitting this pumping by the defendant is affirmed without modification, it will be final between the parties, and the defendant will have a perpetual right to continue the drain upon the limited supply. This climate is subject to occasional periods of several successive years of comparative drought. We have recently had a ten-year period of that kind, which was just closing at the time this pumping by defendant began. It is probable that, if another such period, or even shorter one, should occur, or possibly with a normal rainfall, the continuous pumping of one hundred and twenty-five inches from this limited supply will continue to lower the permanent water level of the basin until the plaintiff will be unable to reach it with his pumps. It is not impossible that ultimately the basin will thereby be entirely emptied of water. The findings do not show the quantity of water that will be annually supplied to these underground strata by the average annual rainfall upon the watershed from which it comes. They are silent on this point. It is manifest that if the quantity taken therefrom exceeds the average annual amount contributed thereto, the underground store will be gradually depleted and eventually exhausted. This should not be permitted. The judgment ✓ should be so modified as to provide for, or permit, the prevention of such a catastrophe and to limit the amount taken by all the consumers to a quantity, as near as may be, equal to the average constant supply from the rainfall. It should also be framed so as to prevent the lowering of the permanent level to such an extent that the plaintiff will be unable to obtain by his pumps sufficient water therefrom for use upon his lands.

These observations apply with equal force to the right of the plaintiff to have the supply protected for future use upon the portion of his lands not hitherto supplied with water. The judgment makes no provision whatever for the protection of the right of these lands to share in the water.

It is therefore ordered that the judgment of the superior court be modified by adding thereto, immediately preceding the date line thereof, the following clauses:

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Provided, however, that in no event shall the defendant be allowed to take of the waters in the strata pierced by its wells a quantity greater than is supplied thereto from the average annual rainfall upon the watershed contributing thereto and from other sources; nor shall it be allowed to take therefrom a quantity that will reduce the water level in plaintiff's wells, during the periods when the plaintiff is herein given the right to pump therefrom, to such an extent that the plaintiff, with pumps operating at the depth of his present pumps and with equal capacity, will be unable to obtain therefrom enough water to properly irrigate his said block 191 during such period, not exceeding the quantity hereinbefore stated.

It is further adjudged and declared that the plaintiff, as the owner of said blocks 153 and 190, has the right to take and use of the said waters underlying said block, respectively, a sufficient quantity for irrigation and other uses thereon, or his due share, in case there is not enough for all equally entitled therefrom, at such reasonable times as it may be necessary and convenient to do so, and that such right is parcel of said lands; that he may take such water through and by means of wells situated thereon, and that he must, when he desires to use the same, give the defendant ten days' notice of the time or times when he will begin such use, and the defendant must thereupon at such times cease pumping its wells for a sufficient time to allow plaintiff to obtain enough water for one irrigation of so much of the particular block as may then require irrigation; that the continued pumping of said water in future by said defendant, as herein permitted, shall not be deemed adverse to the rights of plaintiff herein declared, whether such rights are, or are not, used by plaintiff, and that defendant be forever enjoined from asserting or claiming rights in such water paramount to those of plaintiff herein declared.

Nothing in this judgment shall be construed to prevent the defendant from pumping from its said wells on block 192, at the times when by this judgment it is allowed to pump therefrom a quantity of water which, when added to the natural

flow, if any, of said wells, will equal a flow of thirty inches of water measured under a four-inch pressure, and using the same on distant lands.

As thus modified the judgment shall stand affirmed.

Subterranean Waters—Presumed Percolating—Intent.

BARCLAY v. ABRAHAM et al.

(121 Iowa, 619, 100 Am. St. Rep. 365, 96 N. W. 1080, 64 L. R. A. 255.)

Plaintiff is owner of the south one-half, southwest one-quarter of section 10, and north one-half, northwest one-quarter of section 15, township 82 north, of range 25 west, of the fifth P. M. The defendant owns the north one-half, southwest one-quarter of section 10. A run, known as "Big creek," nearly north and south, passes through both farms to the south. Following the trend of this creek for three or four miles in a northwesterly and southeasterly direction, and about one-half mile wide, flowing wells are obtained at a uniform depth, considering the elevation of the surface. The plaintiff has lived some time on his south 80 at about the center of this district, and several years ago sunk one of the first wells near his house, somewhat above the level of the creek. Later two other wells were sunk, one in the valley of the creek in the north 80, and the other about thirty rods from his barn, to which an underground pipe was extended to a tank at the barn. In July, 1901, the defendant Abraham put down a three-inch well on his farm near the south line, close to the creek, to which he dug a ditch, and allowed the water to flow unrestrained through the creek to the land below. This resulted in stopping the flow of water from plaintiff's wells at his house and near the barn. In pursuance of a temporary writ of injunction, the flow of defendant's well was reduced to one-fourth of an inch, whereupon water again flowed from plaintiff's well. Upon final hearing the injunction was made permanent, and defendant appeals. Affirmed.

LADD, J.—The particular district within which flowing wells may be obtained at a depth varying from one hundred

to two hundred feet is three or four miles in length by about one-half mile in width, following the direction of the creek. Within this area there are at least eleven wells which are now or have been flowing above the earth's surface. That of plaintiff, near his barn, is one hundred and fifty-two feet deep. The well sunk by defendant is only one hundred and seven feet deep, but on ground about as much lower as the difference. Its casings are three inches in diameter, and the flow, when interrupted, has the effect of stopping plaintiff's well and several others. It is located near the south line of defendant's land, from which the water runs in the creek, and, save that necessary for about thirty head of cattle, is without benefit to him or anyone else. The water in excess of a stream one-fourth inch in diameter, to which extent the district court directed him to restrain the flow, is absolutely wasted, and so done without excuse. True, he pretended that the entire flow was essential to prevent clogging with sand or gravel, but the evidence shows conclusively that this was less likely with the smallest available exit. Again, he pretended to have in contemplation the elevation to his tenant's house, across the eighty acres, up some forty feet, of water for domestic use by the operation of a hydraulic ram. But the extent of his preparation therefor was the reading of a circular from some manufacturing company. There was no proper showing that the flow permitted would be inadequate for this purpose, and it conclusively appears that it had nothing to do with his insistency upon utterly wasting the water his neighbors so much needed. Indeed, the record indicates strongly his object was to maliciously cut off the water supply of a well owner other than plaintiff. In the light of these facts, it is not very important that we determine whether the water was supplied by percolation through the soil or a well-defined subterranean stream. If the latter, of course, the water might not thus be diverted. . . .

But the presumption obtains that such waters are percolating waters, unless shown to be supplied by a stream of known and defined channel. . . . And it follows that the burden of proof is upon those asserting right to waters below the surface, on the ground that they flow in a defined and known channel, to establish the existence of such channel. (*Black*

v. *Ballymena Commrs.*, L. R. 17 Ir. 459; *Huber v. Merkel, supra.*) It is to be observed that the mere existence of the channel is not enough; its location must be known or reasonably ascertainable. . . . Surface indications of a stream are discussed in *Tampa Waterworks Co. v. Cline, supra*, where surface depressions extended on either side of a spring; in *Hale v. McLea*, 53 Cal. 578, where a line of bushes usually found nowhere except over watercourses extended from a spring on adjoining land. (See, also, *Saddler v. Lee*, 66 Ga. 45, 42 Am. Rep. 62; *Wheatley v. Baugh, supra*. Valuable note to *Wheelock v. Jacobs*, 67 Am. St. Rep. 665.) In the instant case surface indications do not aid in locating a stream below. The mere fact that the excessive flow from one well interrupted that of several others did not tend to point out the location, course, or even existence of a subterranean river or smaller watercourse. (*Taylor v. Welch*, 6 Or. 199.) A similar result would be as likely to occur when the supply is derived from water filtrating through the soil until caught in a stratum of sand and gravel lying between impervious layers of other material. (See *Huber v. Merkel, supra.*) Indeed, the fact that large quantities of sand and gravel are drawn up when the level at which water is found is reached strongly sustains the latter view. But we need go no further than to say there is nothing in the record to overcome the presumption that the supply of the entire district is percolating water. If a stream one-half mile wide, it could scarcely be affected by the small outlets afforded by these wells. If a number of narrower streams flow beneath the surface, the location of none has been pointed out nor appears ascertainable. . . .

This being true, there is no doubt but defendant had the right to make such beneficial use of the water in the improvement of his land as he might choose. But it does not follow that he had the right to draw from this reservoir within the earth, wherein nature had stored water in large quantities for beneficial purposes, merely to waste or carry out a design to injure those having equal access to the same supply. Decisions to the effect that percolating waters are to be treated the same in law as the land in which found, and may be diverted, consumed, or cut off with impunity, with-

out liability for interfering or destroying the supply, are numerous in this country and England—too numerous for citation. . . . In the last of these cases the principle underlying the right to such waters, and the reasons upon which it rests, were thus stated: "In the absence of express contract and positive authorized legislation, as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth; and this mainly from considerations of public policy: (1) Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would be therefore practically impossible; (2) because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage, and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and general progress of improvement in works of embellishment and utility." An examination of the authorities, however, indicates that they proceed upon the theory that the right thereto relates to the beneficial use of the land, and is connected with its enjoyment for the purposes of agriculture, mining, trade, improvement, and the like. This thought is emphasized by the *dicta* in many decisions to the effect that percolating waters may not be extracted from the earth to the injury of others merely to gratify malice. Thus, in the leading case of *Wheatley v. Baugh*, *supra*, the court declared that "Neither the civil law nor the common law permits a man to be deprived of a well or spring or stream of water for the mere gratification of malice. The reason is that water, like air, is of such a nature that no one can have an exclusive right in it. In the process of evaporation and condensation it is sent in refreshing showers all over the earth. In its descent into the ocean it necessarily passes from the one to the other, and is intended for the benefit of all. The right of each is more or less dependent upon that of his neighbor." . . .

The doctrine of correlative rights between land owners respecting the appropriation and use of percolating waters has

been broadly applied in New Hampshire (*Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276), where the court declared that no good reason could be given why it should not be applicable in all cases where the rights of owners of adjoining lands to collect and use percolating waters are in apparent, though not real, hostility. . . . This would be extracting the subterranean water from the adjoining land to its injury, without any counter benefit to the land through which taken, and presents a stronger case for the interference of a court of equity than *Forbell v. City of New York*. There the drainage rendered the adjoining land unfit for the growth of watercresses, which had formerly been raised upon it; here it destroyed the water supply essential for its customary use and enjoyment. There the drainage was to secure water to distribute to the inhabitants of a great city for profit; here the object was to turn it into a creek to flow unused in any way down to another's land below. The soundness of some of the reasoning of the *Forbell* case may well be doubted. The exertion of the force there was in the removal of the subterranean waters in the city's land, and the only suction occasioned was by emptying a cavity into which the water naturally drained from the surrounding country. It is at least exceedingly doubtful whether this constituted trespass. In a lesser degree this happens whenever the sinking of one well has the effect of drying up another. The doctrine of *Smith v. City of Brooklyn*, that the free use of such waters is limited to the improvement, use, and enjoyment of the land from which taken, and cannot be carried away for the purposes of commerce or waste, to the injury of the premises of an adjoining owner, has the better reason for its support. But we need not go this far, even to sustain the decree of the district court, as in the case at bar the owner derived no benefit from the sale or use of the water. As said, the case is in principle like *Stillwater Water Co. v. Farmer*, *supra*. The doctrine there announced is in harmony with good morals. It interferes with no valuable right to the defendants. It shields from destruction property rights of great value belonging to the plaintiff and others. It goes no further than to say that a land owner may not collect, drain,

or divert waters percolating through the earth merely to carry from his own land for no useful purpose, when such action on his part will have the effect of materially injuring or destroying the well or spring of another, the waters of which are devoted to some beneficial use connected with the land where found. It applies in principle the doctrine of correlative rights to the control of subsurface waters whenever the appropriation proposed is unconnected with the use, enjoyment, or improvement of the land from which taken.

Affirmed.

Percolating Water—Diversion—Rights of Mexican Grantees and Pueblo Rights.

CITY OF LOS ANGELES, Respondent, v. A. V. POMEROY et al., Appellants.

(124 Cal. 597, 57 Pac. 585.)

BEATTY, C. J.—This is a proceeding to condemn “all the estate, right, title, and interest” of the defendants in and to a tract of land embracing about three hundred and fifteen acres, for the purpose of enabling the plaintiff—a municipal corporation—to construct and maintain thereon the “headworks” of its projected system for supplying water to its inhabitants for private and municipal purposes. The defendants, appealing from a decree of condemnation and from an order overruling their motion for a new trial, not only allege numerous errors in the rulings of the superior court, but challenge the correctness of its findings of fact in many important particulars. With respect to these disputed facts it will be necessary to state the various contentions of the parties in discussing the particular legal questions to which they give rise, and, passing them over for the present, we will, in this connection, only attempt to set forth the more general aspect of the case, as to which there is no substantial disagreement.

The city of Los Angeles, at the date of the commencement of this action, June 8, 1893, contained a population of about seventy thousand souls, and covered an area of about twenty

thousand acres. At the date of the trial, in March, 1896, the population was upward of seventy-five thousand, having increased to that number from less than twelve thousand in 1880. This rapid growth of the city promises to continue, and the only source of water supply for its inhabitants and for municipal purposes is the Los Angeles river, which flows through the city from north to south. The principal source of the river above the city is the San Fernando valley. This valley, embracing a watershed of from four hundred and fifty to four hundred and ninety square miles, is almost completely inclosed by considerable ranges of mountains, rising in places to an elevation of over six thousand feet. (The most important of these ranges is the San Fernando, which bounds the interior valley on the north. On the south and west it is bounded by the Cahuenga range, which at its northwestern extremity unites with the San Fernando.) On the east the Verdugo hills are connected with the San Fernando range on the north, and, extending toward the south, leave a comparatively narrow outlet to the valley between their southern extremity and the eastern prolongation of the Cahuenga range. Through this outlet at the southeastern corner of the interior basin the Los Angeles river issues, flowing in an eastern direction parallel and close to the northern base of the Cahuenga range, until, having passed that obstruction, it turns to the south and flows through the city to the Pacific Ocean. The interior of the San Fernando valley is a plain composed of detritus washed from the mountain sides, and having a moderate slope from the San Fernando range on the north toward the Cahuenga range in the south, and from the west toward the east. This portion of the valley—that is to say, the portion composed of material not in place, detritus washed from the mountain side—which, for convenience, may be called the valley proper, extends about twenty-four miles from east to west, and is about twelve miles wide at its widest part, embracing an area of about one hundred and eighty square miles. Its material is composed of boulders, gravel, sand, and occasional masses of clay. The rainfall within the watershed of the valley is variable. When it is abundant, and the loose, porous material composing the valley proper

is thoroughly saturated, the streams issuing from the rocky canyons of the mountains flow over the surface to the outlet of the valley and pass off as flood waters down the channel of the Los Angeles river. But this surface flow does not continue for any great length of time, and, under ordinary conditions, the mountain streams sink in the sand within a short distance of the mouths of the canyons, and no water appears upon the surface until it shows itself again in the Los Angeles river, where it takes its rise a short distance north of the Cahuenga range on the southern side of the valley proper.

The land which the city seeks to condemn lies at the base ✓ of the Cahuenga range, in the narrow outlet of the valley. It is almost two miles in length from east to west, and averages a quarter of a mile in width. At its eastern end it is about a mile west of the point where the Verdugo hills make their closest approach to the Cahuenga range—the width of the valley proper at this point being about two miles. Where the land lies the width is from two and a half to three miles. The surface of the river where it flows out of the land in question at its eastern end has an elevation above the sea level of about four hundred and sixty feet, and is two hundred feet higher than the main portion of the city of Los Angeles. In ordinary seasons, after the flood waters have run off and the river has assumed its normal condition, the water rises to the surface at some distance west of the land sought to be condemned, and increases rapidly in volume as it flows toward the east. There is considerable difference between the estimates of different witnesses, but it may be said in general terms in this connection, where strict accuracy is not important, that the surface flow of the river, where it enters the tract in question, is about twelve hundred inches, miner's inches, and that its volume is about doubled by the accessions it receives in passing through the tract. These accessions are of the character that would naturally be expected from the topography of the valley and the nature of the soil under and adjacent to the surface stream. The ✓ whole country on either side of the stream is found to be completely saturated with water—the plane of saturation near the open channel being slightly higher than the surface

of the river, and gradually rising in proportion to the distance from the stream. From the sides and bottom of the visible stream the water percolates, or trickles, or gushes, according to the nature of the soil, whether fine and comparatively compact, or coarse and gravelly and more loose and porous.

The plan of the city for utilizing the land which it seeks to condemn is to drive a tunnel through it from east to west, a few feet below the bed of the river, and to extend filtration galleries north and south from the tunnel in such number and at such places as may be found best adapted to securing an ample supply of water. The plan also embraces a submerged dam and collecting chambers or reservoirs, but the main feature is the tunnel with its lateral galleries, from which the water, draining and filtering out of the saturated soil, is to be delivered to the main supply pipe of the city, and thence to its distributing system.

The principal points of controversy between the parties are: 1. As to the existence of a well-defined subterranean stream by which the waters, or a large portion of the waters, resulting from the rainfall within the watershed of the San Fernando valley, are carried off through the pass between the Cahuenga range and the Verdugo hills; and 2. As to the rights of the city of Los Angeles, as successor to the Mexican pueblo, in the waters of the Los Angeles river.

The claim of the plaintiff is, that the city has certain extensive rights in the stream over and above those of ordinary riparian owners, and that the stream itself consists not only of the visible surface flow of the river, but of the large subterranean flow slowly passing through the boulders, gravel, and sand under and adjacent to the river.

Both of these claims are disputed by the defendants, and out of this controversy arise most of the points to be considered in disposing of the appeal. As to the rights of the city as successor to the pueblo, the allegation of the amended complaint is, that ever since its organization the city has been the owner in fee simple of the exclusive right to the use of all the waters of said river, from its source to the southern boundary of the city, in trust for the public purposes of supplying the inhabitants of said city with water for domestic

uses, and of supplying water for the irrigation of the irri-
gable lands embraced in the four square leagues of the
pueblo, and for other municipal uses. And it is alleged that
the defendants own the land sought to be condemned, subject
to this right of the city to the waters of the stream. These
allegations are denied by the defendants, and, in view of the
issue thus made, the defendants, before the commencement of
the trial, moved the court to stay the proceedings in the
action until the determination of certain other suits then
pending between the city and the defendants, in which the
question as to their respective rights in the waters of the
river was involved. The defendants also moved to strike out
the allegations of the complaint setting up the claim of the
city to the waters of the stream, contending that the city
could not maintain a proceeding to condemn lands while
asserting title in itself to that which constituted their chief
value. These motions were denied by the superior court, and
the exceptions to the rulings thereon give rise to the first
point discussed in the briefs. Before taking up this point,
however, it may be well to state the manner in which, by
consent of the parties, the case was tried. It was stipulated
that the court, sitting without a jury, should hear the evi-
dence of the parties for the purpose of determining: 1.
Whether the use to which the property was to be applied was
one authorized by law and the taking necessary; 2. Whether
the proposed plan was compatible with the greatest public
good and least private injury; and 3. What was the nature
and extent of the plaintiff's interest in the waters of the
river. And these things being determined, that a jury
should be impaneled to assess the amount of compensation
to be awarded to the defendants for the interest condemned.
In accordance with this stipulation the court heard evidence
bearing upon the three points mentioned, and at its close
called a jury, before whom the trial proceeded upon the
question of damages. During the progress of the jury trial
the court made an oral announcement of its conclusions upon
the issues submitted to its decision, but no formal findings
were filed until after the jury rendered their verdict. The
court, however, in charging the jury instructed them as to
those matters so far as it deemed such instructions necessary.

The consent of defendants to this mode of trying the various issues in the case was, however, given with an express reservation of their objection that the court had no jurisdiction in this proceeding to try any question of title in the plaintiff to the waters of the river, and they now contend that the superior court erred in refusing to stay the trial of the cause until the respective rights of the parties had been determined in other pending suits; and this upon the ground that a proceeding for condemnation is not one in which adverse claims of title can be adjudicated.

This contention is rested upon the proposition that the proceeding, being statutory and special, must be strictly pursued, and, since the statute makes no express provision for litigating a claim by the plaintiff to an interest in the property sought to be condemned, the court has no power to determine such claim, at least when contested by the defendant. But we think the statute does not require so strict a construction. The superior court is invested with a general jurisdiction of all special proceedings not otherwise provided for; and in conducting such special proceedings exercises its usual and ordinary powers in disposing of the issues which are necessarily involved. Among the matters which may be involved in any proceeding to condemn private property for public use are adverse claims to the compensation to be awarded. In such proceedings the complaint must contain the names of all owners and claimants of the property, if known (Code Civ. Proc., sec. 1244), and all persons claiming any interest in the property, or damages, though not named, may appear and defend. (Code Civ. Proc., sec. 1246.) And the court has power "to hear and determine all adverse and conflicting claims to the property sought to be condemned, and to the damages therefor." (Code Civ. Proc., sec. 1247.)

These positions are, of course, conceded by the appellants, but they contend that the right to set up and litigate adverse claims is confined by the very words of the statute to those who are defendants. It is true the express provision above quoted from (Code Civ. Proc., sec. 1247) applies only to the conflicting claims of those who are made, or who make themselves, defendants in the proceeding, but this is only because the interest of the defendants alone are to be con-

demned. The statute does not contemplate the condemnation of an interest which the plaintiff already has, or the payment of any damages except to compensate those whose property is to be taken away; and therefore, the plaintiff can have no concern in the determination of "adverse or conflicting claims to the property sought to be condemned and the damages therefor." But, although this provision of the statute has no direct bearing on the question here presented, it contains an express legislative recognition of the entire competency of the court to try and determine adverse claims to the property in a proceeding to condemn.

The question, however, which we have to decide is this: ✓
Can a plaintiff who is already the owner of an interest in land secure the condemnation of outstanding interest in a case which in other respects is a proper one for condemnation?

This is an important question, for it is apparent that such cases may frequently arise. Private property suitable and necessary for some lawful public use is often owned in shares by different persons, or subject to liens or servitudes, and the owner of a share, or an easement, or holder of a lien, may be the proper agent of the state for the exercise of its power of eminent domain. In such case, it is certainly desirable that the law should supply a convenient procedure by which he could secure exclusive control and ownership of the property upon payment of the value of the outstanding share, or of the whole, less the amount secured by lien, or as diminished by the existing servitudes. The defendants do not seem to contest the proposition that our statute is adequate to the exigencies of such a case, but they contend that, (when the ✓
interest asserted by the plaintiff is disputed, the proceeding to condemn must be held in suspense until, in a separate action, the respective interests of the parties are judicially determined.) But why the necessity of such circuitry of action? Both branches of the controversy would in any event be tried and determined in the same forum, and there seems to be no good reason why they may not be litigated in one action. Even if the adverse claim of the plaintiff were first determined in an action to quiet title, its subsequent assertion in a proceeding to condemn—whether admitted or

contested—would be just as foreign to any express provision of the statute as if his right had never been determined. It follows, therefore, that the argument that the court can do nothing in these proceedings, except that which is in terms authorized by the statute, proves too much. It would not only debar the plaintiff from proceeding before his title had been adjudicated, but would debar him always.

(We see no reason for holding that a plaintiff is debarred from proceeding in such a case, nor can we see that the trial of all the issues in one action is attended with any special inconvenience.) In whatever mode the plaintiff's interest in the property might be determined—whether in a separate action, or preliminarily in the proceeding to condemn, as was done in this case—the same consequences would follow; that is to say, the jury called to try the question of damages would require instructions as to the nature and quantity of outstanding interest remaining in the defendants, upon which to base an estimate of the damages, and the defendant would have the same remedy in case of erroneous instructions in either case. Considerations of convenience, therefore, do not seem to sustain the contention of appellant on this point. On the contrary, it would seem that very great public inconvenience might ensue if a plaintiff, asserting an interest in property which he seeks to subject to a public use, were obliged in every instance to prosecute to final judgment an action to quiet title before he could proceed to condemn. And if he can commence the proceeding to condemn before his interest has been adjudicated, it does not seem that a denial of his interest should stop the proceeding, for it is in the same court in which that issue must be tried in any event, and to try it when it is first made is only to do that which is necessarily incident to a proceeding clearly authorized, and express authority to do anything always implies the power to do that which is necessarily incidental.

If the views above expressed are in themselves reasonable, and if they embody a proper construction of the statute, they ought to prevail, even if opposed to previous decisions of this court; for no vested right can be violated or impaired by freeing a statutory remedy from inconvenient and burdensome restrictions imposed by a mistaken construction of the

law. We are satisfied, however, that there is nothing decided in any of the cases referred to by counsel for appellants which is at all inconsistent with our conclusions. . . .

4. The next contention of appellants is, that there is no authority in law for the condemnation of these three hundred and fifteen acres in fee simple for the purposes for which the property is sought to be condemned.

An ordinance of the city of Los Angeles, approved on the eighth day of June, 1893, is attached to and made a part of the complaint. By its first section it ordained that it was necessary that the land in controversy "be acquired by condemnation for the purposes of constructing headworks for a water system." It will be seen that the purpose to which the land was to be devoted was not very definitely stated in the ordinance, but the amended complaint filed herein is somewhat more explicit and shows with reasonable clearness what the plan of the city is. The land is found to be saturated with water to within a few feet of the surface. It is proposed to construct a subsurface dam at the lower end of the tract. A subsurface dam, of course, would not have the effect of flooding the surface permanently, but it would permanently raise the plane of saturation. This being done, it is next proposed to tap this heavily saturated bed of sand and gravel by means of a tunnel connected with lateral galleries through which the water will be drained off and conducted to the supply pipes. In other words, the land is to be used as a reservoir, such as essentially it is, and none the less so because the water does not rise and stand above the surface. The evidence in the case shows that from one-fifth to one-third of the entire bulk of the material filling the valley below the plane of saturation is water. (The land in its natural state, therefore, is a reservoir, and a subsurface dam is to be constructed in order to make it better serve the purposes of a reservoir. Such being the use to which it is to be devoted, the fee simple may be taken. (Code Civ. Proc., sec. 1239; Stats. 1891, p. 102.)

As to the necessity of taking the whole three hundred and fifteen acres the evidence is conflicting, and the finding of the superior court cannot be disturbed. The evidence introduced by the plaintiff showed that, in view of the rapid increase of

the population of the city, the probable necessity of extending additional lateral galleries to obtain a larger flow of water, and to conform to changes in the channel of the surface stream, and the necessity of excluding livestock from the land to prevent contamination of the water, it was necessary that the city should have the exclusive ownership and control of the whole tract.

5. Appellants next contend that the amount awarded by the jury as compensation for the tract condemned was not justified by the evidence. The jury found that the value of the defendant's interest in the three hundred and fifteen acre tract was twenty-three thousand dollars, and that their remaining land would be damaged two thousand dollars by the severance of the smaller parcel. (Appellants concede that the evidence sustains this verdict if the value of the land for agricultural purposes is alone to be considered, but they claim that it is of enormously greater value by reason of the great quantity of water percolating in the soil, which, they contend, they have a right to collect and convey away to other lands for sale.)

This claim of ownership of percolating waters is met by a claim on the part of the plaintiff that what the defendants call percolating waters are as truly a part of the Los Angeles river as the visible surface stream, and out of this contention arise the most important questions in the case.

There seems to be no substantial conflict in the evidence and no radical difference between the parties as to the character of the subsurface flow in the tract condemned. It is agreed that all the waters of the San Fernando valley, except what is lost by evaporation or consumed in plant life, flow out through the narrow pass between the eastern extremity of the Cahuenga range and the Verdugo hills, either on or beneath the surface, and there is abundant testimony to warrant the conclusion that at ordinary stages of the river the water flowing on the surface and that which is beneath the surface are in intimate contact and moving in the same direction. The land condemned is situated a short distance west of the narrow outlet of the valley, but the conditions, though differing slightly in degree, are substantially the same. The valley is somewhat wider, but there also the water on the surface

and that beneath the surface are in contact and all flowing in the direction of the outlet—on the surface at the rate of two or three feet per second, underground at an estimated rate of from fourteen to seventeen miles per annum. It appears, also, as stated above, that the Los Angeles river first appears as a surface stream a few miles west of the tract condemned, and gradually increases in volume as it flows to the east. The fact of this gradual increase in the surface flow of the river, taken in connection with the other facts above detailed, would seem to warrant the inference that the waters of the San Fernando valley, in seeking an outlet to the ocean, flow under the surface as far as they can find room to pass through the boulders, sand, and gravel which fill the space between the hills on either side, and gradually rise above the surface as the valley narrows and leaves less and less room for passage underneath. Much the larger portion of an extremely bulky record is filled with the evidence of expert witnesses in regard to the topography of the San Fernando valley, the material composing the valley proper, the amount of rainfall, measurements of surface flow, and a great variety of matters bearing upon this question of a subterranean stream. A careful study of this testimony, which, though conflicting upon many important points, is in reference to the larger and more general aspects of the case quite harmonious, convinces us that it is sufficient to sustain a finding in favor of the existence of a subterranean stream if the law with respect to subterranean streams was correctly laid down in the charge of the court to the jury. There can be little doubt, we think, that the jury, under the instructions of the court, found that the subsurface flow in those lands was a part of the Los Angeles river and governed by the law of riparian ownership, or by a pueblo right still more favorable to the plaintiff. If this was the finding, and if it was made under correct instructions, it cannot be said that the award of compensation is unsustained by the evidence, for, aside from the water flowing in the subterranean portion of the stream as defined by the instructions, there is no evidence to prove the existence of any considerable quantity of percolating water in the tract condemned, and the same evidence which shows an inconsiderable quantity of such water tends

strongly to prove that it could all be intercepted or drained by the owners of the adjoining lands before reaching the land taken. That is to say, if the defendants have the right to tunnel or trench their lands below the plane of saturation for the purpose of draining off water which has not yet reached the surface, or subsurface, stream, their neighbors on the north have the same right, and, since only a very small portion of the three hundred and fifteen acre tract is higher than the bed of the stream, the percolating waters which they could drain without interference with the stream would be too inconsiderable in amount, and their right too precarious to add materially to the value of the land. Our conclusion ✓ on this point is that the verdict must stand if the jury were correctly instructed, and this brings us to the consideration of the most important questions involved in the case.

6. A great many exceptions were taken to different instructions given by the court, and it is now insisted by appellants that the entire charge was in substance erroneous, and that the court erred in refusing to give the instructions requested by them because they presented the law correctly, while the instructions actually given did not present it correctly. In view of the great number of exceptions to the charge on account not only of what it contains but of what it does not contain, there seems to be no more convenient method of presenting the points to be considered in this connection than by quoting very extensively from the record.

The court charged the jury as follows: . . .

“IX. A riparian proprietor is not entitled to convert (for any purpose except for purposes for which he is entitled to make use of, water on his riparian lands as specified in these instructions) any portion of the waters of a watercourse, or stream, whether surface or subterranean; and he cannot by any indirect means make such diversion where he would not have been authorized to do so directly.

“Therefore, a riparian proprietor cannot, by sinking tunnels or making other excavations under the sides or underneath the bed of such watercourse, draw away for use on nonriparian lands any of the waters flowing in such watercourse, although said excavations may not directly touch said stream; if for instance, the water of such stream percolates

into the banks or bed thereof to a considerable but limited distance, and such percolating water is stationary, or has very little motion, said riparian proprietor would have no right to make an excavation so as to draw off said percolating water, if the effect would be to cause any of the running waters of said stream to leave the same in order to fill up the voids left in the banks or bed from which said percolating waters were drawn by such excavation, any more than if said excavation were made so as to tap said stream directly.

“X. The mere fact that some of the subterranean water forming part of the stream on the lands sought to be condemned may be lost before reaching the point where the same would have gone into and made up part of the surface or subterranean stream of the Los Angeles river, would not give the defendants the right to divert an amount of said subterranean waters in said lands equal to or less than the amount so lost, if such diversion would have the effect of diminishing the waters, surface or subterranean, of the said river at any point above the south line of the pueblo lands of the city of Los Angeles. . . .

“XII. In addition to these rights and benefits arising from the flow of the river through this land, the defendants are the absolute owners of all such water as may be present in the soil of this land and which does not constitute a part of the water of the river. This is usually called percolating water. There is, however, no magic in the word ‘percolating,’ and the fact that any witness may apply that word or refuse to apply it to any particular class of waters of which he may speak is not conclusive of the question whether or not such water does or does not form part of the river. That question is to be determined by you from a consideration of the facts proven. The right and ownership of the defendants in this class of waters is distinct from and much greater than their right to the waters of the stream. As to the waters of the stream, they have a right only to the use of it on this land and they do not own its corpus, or its body, or the very water itself, and they have no right to take it away from the land and use it on other lands, or to sell or dispose of it for use on other lands or at other places. But as to this other water, if any there be in this land, not a part of the stream, they

are the absolute owners of it, to the same extent and as fully as they own the soil, or the rocks, or timber on the land. Therefore, if, by any means, they can separate this water from the land, they have an absolute right to the water thus separated, and may conduct it away and sell or dispose of it anywhere as they see fit, subject only to the limitation that they may not excavate or do anything on the land for the mere purpose of intercepting such water and preventing it from flowing into the stream or watercourse on the land of another, and without intending to make any beneficial use of it themselves. Whatever additional market value this land may have had by reason of the presence therein of water of this class, or by reason of the feasibility of separating it from the land, or of using it on the land, or of conducting it to some other place for use or sale, or of the great market value of such water for such purposes, or by reason of all these things combined, or by reason of any other lawful benefit or advantage which this water gives, this additional market value inures to the benefit of the defendants and is a part of the compensation to which they are entitled in this case as the value of the land to be condemned. . . .

“XXIII. If the jury believe from the evidence that the subterranean waters in the land sought to be condemned are percolating without any definite channel, and that the same are not a subterranean watercourse or stream, and if they believe that such waters come on to said lands from the lands of others above, or pass from the lands sought to be condemned down to the lands of others lying below, and that such upper proprietors could, by the construction of tunnels or other works, cut off or divert said waters, or some part thereof, from the lands sought to be condemned, or that such lower proprietors could construct tunnels or other works on the lands lying below the lands sought to be condemned, which would have the effect of draining or depriving the lands sought to be condemned of their subterranean waters, to the extent that the owners of the land sought to be condemned could not make a practical use thereof, or of some part of said waters, then the jury are instructed that such upper and lower proprietors would have the same rights so to appropriate said waters on their lands as the defendants would

have on the lands sought to be condemned, and the jury must take those facts into consideration so far as they diminish or destroy the value of the rights of the defendants to said waters, or such portion thereof as could be so diverted or drained so as to deprive defendants of the practical use thereof."

We will now take up the specific objections of the defendants to these instructions in the order in which they are stated. The first is to instruction No. 10. It might be sufficient answer to the objection now urged in the argument to say that it is not one of the objections stated at the trial and specified in the exception then taken. But, waiving that point, it seems clear to us that unless the entire theory of the instruction in regard to underground streams and percolating waters is wrong, this instruction is right, or at least is harmless. (The fault found with it is that it denies the right of defendants to divert any part of the underflow on their lands, whether the water diverted would ever reach the surface stream or not. But the instruction is limited to subterranean water which is a part of the stream (as in other instructions defined), and if it is a part of the stream it cannot be diverted, whether it would come to the surface or not. It belongs to the stream and must flow on to the lower riparian proprietor. His right to the subsurface portion of the stream is identical with his right to the surface flow, and is entitled to the same protection. As to the criticism that the instruction is meaningless, it must be admitted that it does not clearly explain itself. But the respondent points out that it refers to a claim made by defendants that a large portion of the subsurface flow was somehow lost from the stream between their land and the city, and therefore they could divert an equal or smaller quantity without injury. If such a claim was made, the instruction was perhaps necessary—if it was not made, the instruction was harmless.

Counsel next criticise instruction No. 12, complaining that it confounds percolating waters and waters of the stream in such a manner as to render the court's view of the law absolutely unascertainable, and to give the jury to understand that, notwithstanding water may be percolating, it may still be a part of the stream. We think the meaning of this in-

struction is entirely clear, and that the only question is as to its soundness in point of law. The court certainly did intend in this instruction, and in many others, to tell the jury that water passing through the voids of any loose permeable material filling or partially obstructing the channel of a stream is still water of the stream. If it all sinks beneath the surface the whole stream is subterranean; if a part sinks and the remainder flows upon the surface, that which is invisible is as much a part of the stream as the surface flow. (The difference between counsel and the superior court at this point seems to be that to them all water passing through sand, gravel, and boulders is percolating water, and the mere fact of percolation is inconsistent with the idea of a stream while to the court there is no such inconsistency when the material through which the water forces itself fills a well-defined channel with impervious sides and bed, through which a considerable body of water flows from its source to its resting place. If this view of the court is correct, the instruction is neither erroneous nor obscure. ✓

The quotations made by counsel from instructions Nos. 13, 14, 15, 16, 17, 18, and their criticisms thereon, are all directed to the proposition that the court understood and intended the jury to understand that nothing is essential to the constitution of a subterranean stream except that the general direction of the flow of the water is discoverable. That in this sense the whole San Fernando valley is a subterranean stream, and the jury might as well have been instructed in terms to find that there was in this land no percolating water, the property of the defendants. We do not think the instructions referred to, taken by themselves, necessarily bear this construction, and certainly when considered in connection with those numbered 19 and 20, and others, it clearly appears that the court was not giving, or intending to give, a definition which would make the whole San Fernando basin a subterranean stream. The instructions, taken altogether, are applicable in their definition of a subterranean stream exclusively to the comparatively narrow outlet of the valley between the Cahuenga range and the Verdugo hills, where all agree that the entire rainfall of the valley passes out, partly on and partly beneath the surface, between the

rocky and comparatively impervious mountain sides on either hand. It is true this pass, on the surface, is from one and a half to two and a half miles in width, and that in it borings have been made over a hundred feet in depth before encountering bedrock, but here is not only water moving in a definite direction, but also sides and bed to the channel in which it is moving, and these, also, are comprehended in the court's definition of a subterranean stream. Another objection to these instructions, particularly to number 16, is that they charge the jury upon questions of fact. We cannot see that these instructions are at all objectionable upon this ground. What a subterranean stream must be in order to bring it within the law of riparian rights is a question of law, and the entire scope of these instructions includes nothing but a statement of the facts which the jury must find from the evidence in order to determine whether there is a subterranean stream, and, if so, how much of the water in the land is part of that stream. This is in nowise a transgression of the province of the court. Another objection to several of these instructions is that there was no evidence upon which to base them. We think, however, that there is not only some evidence, but very substantial evidence, contained in the record tending to prove every material portion of the various hypotheses stated in the instructions.

Before proceeding to a consideration of the numerous exceptions of the appellants to the rulings of the superior court upon the instructions requested by them, it will be convenient to first dispose of the main question in the case, viz., the proper definition of a subterranean stream.

There is no dispute between the parties and no conflict in the authorities as to the proposition that subterranean streams flowing through known and definite channels are governed by the same rules that apply to surface streams. The case in which this and cognate questions have been raised and decided are innumerable, and it would be an endless task to review or even to name them. No case involving directly the rights of parties in subterranean streams has been decided in this court, but the law, as applicable to the present case, is well epitomized in section 48 of Kinney on Irrigation, as follows: "Subterranean or underground watercourses are,

as their names indicate, those water currents that flow under the surface of the earth. A large portion of the great plains and valleys of the mountainous regions of the west is underlaid by a stratum of water-bearing sand and gravel, and fed by the water from the mountain drainage. This water-bearing stratum is of great thickness, the water is moving freely through it, is practically inexhaustible, and, if it can be brought to the surface, will irrigate a large portion of the country overlying it. In and near the mountains many streams have a bed which was originally a rocky canyon, but has been filled up with boulders and coarse gravel. In this debris a large portion or all of the water sinks from sight, to reappear only when some rocky reef crosses the channel and forces the water to the surface. The movement of this water through the porous gravel, owing to the declivity of the stream, is often quite rapid, and a considerable volume may thus pass down the channel hidden from sight.

“These watercourses are divided into two distinct classes—those whose channels are known or defined, and those unknown and undefined. It is necessary to bear this distinction in mind in our discussion, as they are governed by entirely different principles of law. And in this connection it will be well to say that the word ‘defined’ means a contracted and bounded channel, though the course of the stream may be undefined by human knowledge; and the word ‘known’ refers to knowledge of the course of the stream by reasonable inference. (Regarding the laws governing these two classes, it must be known that if underground currents of water flow in well-defined and known channels, the course of which can be distinctly traced, they are governed by the same rules of law that govern streams flowing upon the surface of the earth.)

“The owner of land under which a stream flows can, therefore, maintain an action for the diversion of it if such diversion takes place under the same circumstances as would enable him to recover if the stream had been wholly above ground. But for this purpose the underground water must flow in known and well-defined channels, so as to constitute regular and constant streams, in order that the riparian owner

or appropriator may invoke the same rules as are applied to surface streams, or otherwise the presumption will be that they have their sources in the ordinary percolations through the soil. This rule practically disposes of the second class of subterranean waters—those whose channels are unknown and undefined—although there are undoubtedly a great many underground streams whose waters flow in confined channels but whose courses are not known, and, following the above rule, these are all classed with percolating waters.”

The point to be specially noted here is the meaning ascribed to the words “defined” and “known.” “Defined” means a contracted and bounded channel, though the course of the stream may be undefined by human knowledge; and the word “known” refers to knowledge of the course of the stream by reasonable inference.

In this case the boundaries of the channel and the existence and course of the underground stream were unknown and undefined except so far as they could be inferred, but there was a great amount of evidence from which a reasonable inference could be drawn that the channel was bounded and defined by the sloping sides of the Cahuenga and Verdugo hills meeting underground, and that there was a subsurface flow corresponding with the surface flow from west to east out through the gap. Without any excavation beneath the surface, or other test or experiment, all this could be inferred from the topography of the country, the amount of rainfall and the gradually augmenting volume of the surface stream in its approach to the narrowest point in the pass. And the court was certainly justified in submitting to the jury the question whether the subsurface flow was a part of the stream, unless the mere fact that it was forcing its way through sand and gravel and boulders deprived it of the character of a stream.

Upon this point we are satisfied that the view of the superior court was the reasonable and just view and not opposed to anything that has ever been decided in this court.

This is in fact the pioneer case of its kind, so far as this court is concerned. There have been cases here in which injunctions were sought to prevent owners of land from digging or trenching or tunneling in their own premises, upon

the ground that they were cutting off the subterranean sources of springs and streams, and they have been uniformly decided in accordance with the accepted doctrine as to rights in percolating waters—the doctrine which defendants contend is applicable here. Those most nearly in point and most relied on are *Hanson v. McCue*, 43 Cal. 178, *Southern Pac. R. Co. v. Dufour*, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92, and *Gould v. Eaton*, 111 Cal. 639, 52 Am. St. Rep. 201, 44 Pac. 319. But in none of these cases was there any evidence comparable to the evidence here of an underground stream.

Gould v. Eaton, *supra*, comes nearer to this case than either of the others, but in that case it was found by the lower court that the portion of the water as to which there was any controversy was merely feeding the stream by percolation. . . .

This, however, is a matter involved in another aspect of the case, the present inquiry relating exclusively to the proper definition of a subterranean stream. Upon this point we hold that the instructions of the court contain a sound and correct statement of the law as it applies and ought to apply to streams of the character of the Los Angeles river. To hold otherwise would be destructive of rights long supposed to be certain and assured. Upon the doctrine contended for by defendants the whole of the Los Angeles river could be diverted from the city, and the sole water supply of a community of over a hundred thousand people completely cut off. For it is not alone the defendants who own water-bearing lands in the San Fernando valley, and if they can abstract and convey to distant points the water in the land sought to be condemned others can do the same thing. There would be nothing to prevent the driving of tunnels through the Cahuenga range at a dozen points and tapping the water below the level of the surface stream, in such a manner that by extending filtration galleries in sufficient number the whole flow of the river could be abstracted. Once concede that the defendants may draw off the subsurface flow, or any part of it, the same privilege must be conceded to others, and the man or the corporation that can put in the largest tunnel at the lowest level will get the lion's share, while the inhabitants of Los Angeles will get none. The doctrine, therefore, while

ruinous to those who have built up a populous and prosperous city upon faith that they were secure of a supply of water for domestic and municipal purposes, would afford no security to the defendants or to anyone in their situation, for what they could take from the city others could take from them.

We come now to consider the instructions asked by defendants and refused by the court. . . .

It is still more strongly insisted that the court erred in refusing instructions 12, 13 and 14, requested by defendants, which read as follows:

“XII. The rights of the ancient pueblo of Los Angeles, whatever they may have been, were not attempted to be granted by the legislature to the city of Los Angeles, except to the extent of four square miles, and could not, under any circumstances, have extended beyond four square leagues.

“XIII. The uses to which the pueblo was authorized to apply the water was such purposes as appertained to the Spanish pueblo, under the civilization of those times, and it did not extend to the cultivation and irrigation of parks, or the creation and maintenance of artificial lakes therein, or supplying waters for an outfall sewer.

“XIV. The said pueblo of Los Angeles had no paramount rights to the use of the waters for any purpose, as against those grantees of the Mexican government under whom the defendants here claim; but the raising of stock, and tilling the land, granted by the Mexican government to these grantees, were as much parts of the policy of the Spanish and Mexican government as the founding of pueblos and promoting the progress of those towns. And rights to the use of water by the grantees of these ranchos for domestic uses, and stock and agricultural purposes were protected by the laws and policies of those governments, as well as the interests of inhabitants of towns.”

In discussing this branch of the case it will not be necessary to take up seriatim the particular exceptions reserved by the defendants to the giving and refusal of these various instructions. It will be sufficient to consider a few general propositions to which they give rise.

The pueblo of Los Angeles embraced four square leagues (something more than seventeen thousand acres) of land. The city of Los Angeles as originally incorporated embraced the same area, but, by successive amendments to its charter, its area has been about doubled by the addition of lands outside of, but contiguous to, the original pueblo. Within the city several parks have been laid out in which there are artificial lakes of considerable size, with lawns and shrubberies requiring irrigation. An outfall sewer has been constructed, through which the sewage of the whole city is carried to the Pacific Ocean, requiring a large amount of water; the population of the city exceeds a hundred thousand and it is rapidly increasing.

The defendants hold their lands as successors to several Spanish and Mexican grantees, under patents from the United States based upon the original grants. They claim that, even conceding the rights of the pueblo and the city's succession of those rights (a concession which they make only for the purposes of the argument on this point), they are still, by virtue of their ownership of the lands in question, entitled to the exercise of full riparian rights, except so far, and so far only, as those rights are impaired by the paramount rights of the pueblo as they existed before the change of flag and without any legislative addition thereto.

This claim, we think, is clearly just. The legislature of California could grant nothing to the city of Los Angeles which belonged to others, and the rights of the city, as successor to the pueblo, in the lands of riparian proprietors holding under Mexican and Spanish grants, cannot exceed the rights of the pueblo itself.

This being so, the facts above detailed regarding the growth and extension of the city, and the municipal uses to which it is applying the water drawn from the river, give rise to the questions upon which the charge of the court and the instructions requested by the defendants so radically differ.

By instruction No. 4, above quoted, I understand the court to have charged the jury that the defendants had no right as owners of these lands to take any water from the river for irrigation, watering stock, or even for domestic purposes, if by so doing they would deprive the inhabitants of the pres-

ent or future city of Los Angeles of an ample supply for all domestic and municipal purposes.

I think this instruction is erroneous. If the permanent right of the city is only the right of the old pueblo, to which it succeeded, I cannot see how such right covers the requirements of that large portion of the present city outside of the four leagues constituting the pueblo. The inhabitants of that limited territory, to whatever number they may increase, enjoy the full pueblo right, but beyond that territory the right does not extend. The city, of course, has the power to provide water for all its inhabitants and for all public purposes throughout its extended limits, but if, in order to supply the territory outside of the pueblo boundaries, it finds itself compelled to encroach upon the riparian rights of land owners along the river, it ought to pay for those rights the same as for any other private property taken for public use.

This is not the same proposition involved in the case of the *Vernon Irr. Co. v. City of Los Angeles*, 106 Cal. 237, 39 Pac. 762, but it is governed by the same principle, and that case is authority, if authority were required, for my conclusion upon this point.

As to the public purposes for which the city may use water in the exercise of its paramount right, the question is not of such easy solution. The view of the defendants is set forth in the instructions requested by them, numbered 13 and 14, *supra*. No. 14 I think erroneous, because it denies to the pueblo any paramount right for any purpose. And No. 13, I think, is also erroneous in limiting too strictly the purposes for which the city, as successor to the pueblo, has a paramount right to the use of the water of the river. It is certain that irrigation of the pueblo lands was one of the purposes for which the pueblo could take the water, and the fact that some of those lands have been converted into ornamental parks does not impair the right to irrigate them. An out-fall sewer is something which I suppose was never contemplated in the foundation of a Spanish or Mexican pueblo, but this was because the modern system of water supply for domestic purposes and modern methods of house drainage were then unknown. These improvements have made an out-fall sewer necessary for the health and convenience of the

inhabitants of Los Angeles, and since the water was granted or dedicated as much for the health and convenience of the pueblo as for any other purpose, and since it has been practically settled that the pueblo right extends with the increasing needs of the inhabitants, the right to drain the city by means of an outfall sewer, and to keep the sewer in a state of efficiency by the necessary flushing, must be held to be fairly within the pueblo right.

But the maintenance of artificial lakes, by which undoubtedly a large quantity of water is lost through absorption and evaporation, never was necessary for the support or health or convenience of the inhabitants of the pueblo, however much it might have contributed to their pleasure, and I know of no principle upon which their right to use the waters of a river for such a purpose could have been deemed paramount to the ordinary rights of riparian proprietors. It was not only the policy of the Spanish and Mexican authorities to foster the growth of the pueblos, but also to encourage the raising of stock and other rural industries to which the use of water for domestic purposes, the watering of stock, and irrigation were essential, and it is not to be believed that in the primitive condition of society in those times, when the settlement of the country and the support of its inhabitants was the primary consideration, the most favored pueblo would have been allowed to consume in the maintenance of ornamental fountains and artificial lakes water necessary to the sustenance of an essential branch of industry. . . .

Another objection is that the court confuses "actual value," which is the true measure of compensation (Const., art. 1, sec. 14, and Code Civ. Proc., sec. 1249), with "market value" and "actual market value," in such a way that the different instructions are either self-contradictory or unmeaning. We do not think the instructions are self-contradictory, and their meaning we take to be this: "Actual value" is the measure of compensation, but "market value" is the criterion of actual value, and the definition of market value is given in the instructions numbered 25, 26, et seq. If, then, these instructions lay down a correct rule for ascertaining actual value, the charge as a whole is not erroneous. In most respects the charge is sustained by previous decisions of this

court. (*San Diego etc. Co. v. Neale*, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83; *Spring Valley W. W. v. Drinkhouse*, 92 Cal. 528, 28 Pac. 681.) But there is one objection strongly urged in this case which was not involved and could not have been considered in any case formerly decided here.

In several of these instructions the jury are told in effect that in estimating the value of these lands they must not take into consideration any fact discovered since the summons was issued. In other words, to use the illustration put by appellants, if a gold mine worth millions of dollars had been discovered in this land the day after the issuance of summons, the city could take the land by paying its value for agricultural purposes.

This conclusion, it is true, follows logically from the proposition that market value at the date of the summons is to control, and that is the idea upon which the instructions are based. But I think this is a mistaken idea. The thing to be ascertained is not market value, but actual value (Code Civ. Proc., sec. 1249), and the only reason why market value is taken as the criterion of compensation in ordinary cases is because it is in such cases the true measure of actual value—the only practical test. But in a case where discoveries made after the issuance of summons demonstrate that the actual intrinsic value of the land at that date was greater than its market value—in other words, when it appears that market value is no criterion of actual value—those discoveries should be taken into consideration. As such discoveries were claimed in this case, I think the court erred in giving and refusing the instructions referred to.

10. The giving of instruction 9 is complained of upon the ground that there was no evidence upon which to base it. Unless we have greatly misunderstood the defendants' position, the instruction meets one of their claims to percolating waters, but if they do not claim the right to undermine the surface stream and draw off its waters the instruction did them no harm. It stated the law correctly.

And so, also, does instruction 23 lay down a correct rule clearly applicable to the case. The point for the jury to determine was the value given to these lands by percolating waters not a part of the stream—waters which the owners

of the land had a right to convey to a distance for sale. In considering the value of such waters it was certainly material to consider at the same time whether the defendants might not at any moment be wholly deprived of them by the exercise on the part of others of the same right in their lands claimed by defendants with respect to their own. . . .

For the reasons stated in the foregoing opinion I think the judgment and order of the superior court should be reversed, and the cause remanded for a new trial as to the single issue of compensation and damages—the issue, that is to say, which was submitted to the jury on the former trial.

Percolating Waters—Diminution of Surface Stream by Wells—Reasonable Use.

VICTORIA HUDSON et al., Plaintiffs and Appellants,
v. ELLA M. DAILEY et al., Defendants and Respondents.

156 Cal - 617
(L. A. No. 2234, Cal. Dec. 1, 1909) 105 Pac. 000.)

Appeal from the Superior Court of Los Angeles County.
Charles Monroe, Judge. . . .

The plaintiff, Victoria Hudson, alleges that she is the owner of seven hundred and sixty acres of land in the Rancho de la Puente; that said land is riparian to a stream of water known as San Jose creek and is entitled to riparian rights therein, and to receive therefrom for use thereon a flow of two hundred and fifty miner's inches of water; that the water of said stream is directly supplied to it from the saturated soils and gravels of the valley through which it runs; that the defendants have bored a number of wells in said valley from which, some by artesian pressure and some by pumps, but all without right, they obtain large quantities of the waters which feed said creek and appropriate the same to their own use, thereby depleting the streams flowing into the creek to the extent of three hundred miner's inches, and depriving the plaintiff of the waters thereof, and that they claim the right to continue this use of the waters lying beneath their lands. She prays for a decree quieting her

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title to two hundred and fifty miner's inches of water of the creek, and enjoining the defendants from pumping and using the water of said wells to an extent that will prevent a sufficient flow of water in said creek to supply her with said quantity therefrom. The plaintiff, J. W. Hudson, is the husband of Victoria, and has no interest in the suit. In this opinion when we mention the plaintiff we refer to Victoria.

The answer denies many of the material allegations of the complaint. Defendant Currier answers separately, making the additional defense that the plaintiffs' action is barred by the statute of limitation. The action was begun on November 30, 1904. The findings are very full and elaborate. The conclusion of law and judgment was that the plaintiffs take nothing by the suit. A motion for a new trial was denied. The plaintiffs appeal from the judgment and order.

The appellant urges that the findings of the court are, in many particulars, contrary to the evidence. We do not find it necessary to consider all of these specifications in detail. We are of the opinion that, upon a proper view of the case as presented in the court below, all the findings that are necessary to support the judgment are sustained by the evidence.

San Jose creek, in its original natural state, had its origin in the Sierra Madre mountains, from whence it then flowed on the surface of the ground through the plain upon which the city of Pomona is now situated and to and through the San Jose valley. For many years, however, owing to the diversion and use of the water in Pomona and vicinity, there has been no surface stream in the channel from its embouchure from the mountains down to the upper part of the San Jose valley, at which point the stream again appeared on the surface and flowed down to the lands of the parties here concerned. It is the theory of the plaintiff that the greater part of the water of the stream, thus rising in the valley, is composed of water which comes from the mountain streams and sinks into the underlying porous strata extending from the foot of the mountains to and into the San Jose valley and under the lands of the defendants, and which, owing to the narrowing of said valley at its upper end and the consequent elevation of the water plane at that point, rises to the surface and flows in the depression constituting

the channel of the creek. Accepting this as correct, the defendants claim that the plaintiff has shown no legal injury, no invasion of her rights and no ground for relief. The evidence shows that her theory is correct in the main. Some of the water, thus percolating through the underlying strata, comes from rainfall upon the adjacent hills and upon the valley itself and the plain above in the vicinity of Pomona, but this fact does not affect the relative rights of the parties to the water.

There is a finding to the effect that the soils and material of the earth intervening between the respective pumping plants and the creek, "or a considerable portion thereof, are impervious and do not permit the water to pass through them to the creek," that there are different and distinct water-bearing strata underneath the valley surface, between which lie other strata containing no water, and that a part of the water obtained by the defendants' wells is drawn from lower strata which do not feed the creek at the point where the plaintiff obtains her water from it. The plaintiff contends that these findings are not sustained by the evidence. The finding that the waters of the lower strata do not feed the creek, flowing at the plaintiff's dam, is based on the qualified and conditional opinion of certain witnesses that these lower strata were overlaid by a blanket of impervious material, throughout the entire portion of the valley above the dam, through which no water could rise into the creek and into which no water could sink from the strata which do feed the creek. It assumes that there were no breaks or interruptions in this impervious stratum or blanket, through which the waters could pass from it to the strata above or below, or from the upper strata through it. There was no evidence of these facts. If there was in the valley a single acre where this supposed blanket did not exist, the opening would be equivalent to an immense well through which the water would pass from the upper strata into the lower one, if the water in the latter was extracted, or would rise into the upper strata if the water in the upper strata was diminished and there was pressure below, thus depleting or replenishing, as the case might be, the upper strata from which the creek water was directly obtained, and to that extent affecting the flow in

the creek. But as the findings also, in substance, declare that the pumping of the defendants does, to a material extent, decrease the amount of water which the plaintiff is able to divert from the creek and which she needs for the irrigation of her land, the finding as to the lower strata is immaterial. If the pumping by the defendants constituted an unlawful diversion of water to which plaintiff was entitled, it would be no defense that they also took other water from another source.

Each defendant owns a separate tract of land in severalty. All of these lands, except those of Currier, lie within the valley and over the underground porous strata from which the creek issues. Each of these defendants, by means of wells and pumps, takes water from the strata and uses it upon his tract of overlying land. These are the diversions complained of and shown by the evidence. These, coupled with other similar diversions and uses in Pomona and vicinity and a series of ten unusually dry years immediately preceding the action, have caused the stream flowing upon the surface in the creek to diminish to such an extent that, at the plaintiff's place of diversion from the creek, the flow is much less than it was formerly and she is thereby deprived of the use of the quantity of water which, for thirty years previously, she had been accustomed to use.

The court found that none of these defendants takes or uses more water in this way than is necessary for irrigation and domestic use on his particular tract of land. In her briefs the plaintiff practically concedes that this finding is correct. There is no direct evidence to show whether or not the underground supply is insufficient for all demands upon it. If we concede that the circumstances show that it is not sufficient for all, we are then met by the proposition that there was no evidence to prove that said defendants, or any of them, have ever taken more than a reasonable share of such water. The plaintiff tendered no issue of that character. The complaint asserts a paramount right in the plaintiff, superior to that of the defendants. There is no attempt to present a case of excessive use by a defendant entitled to share in a common supply, or to obtain a decree apportioning the waters of the valley among the parties. The evidence

does not supply the data necessary to apportion the water to which each party is entitled. If these defendants are entitled to a reasonable share of this underground water, the plaintiff has shown no case against them.

The lands of the plaintiff and of all of the defendants, except Currier and Ybarra, were originally a part of the Rancho de la Puente. This ranch consisted of about 49,000 acres of land, included practically the whole of the San Jose valley, and was granted by the Mexican government to John Rowland and William Workman. In 1868 these two owners made a mutual deed of partition thereof containing the following covenant: "And it is mutually agreed and covenanted that, notwithstanding this partition hereby made, the rights to use and benefits of the waters of the San Jose creek flowing into said Rancho de la Puente or rising thereon, whether for water power, irrigation or other purposes, shall continue and remain as heretofore to be had, held, possessed and enjoyed by the parties in equal shares and to their heirs and assigns."

The plaintiff's land and all the lands in said rancho belonging to the respective parties are held by title derived from the parties to this deed and covenant.

At the time the Rowland-Workman deed was executed, the ditch and dam which the plaintiff now uses was in use, and by means thereof the water of the creek was carried to the plaintiff's land. It is contended that the effect of the covenant aforesaid was to bind each of the parties and their successors in interest to maintain his land in such condition, and make only such use thereof as would enable her to continue to obtain from the stream by said dam and ditch the same amount of water that was then taken therefrom and used on her land, and that the extraction of the underground water and consequent diminution of the flow in the creek is a violation of the covenant. We do not think it was intended to have that effect, but that it merely divided the rights to the water into equal shares between them, regardless of frontage on the stream or other circumstances affecting the amount to which each would have been entitled. But, conceding that it would have the effect as contended, between the successors of Rowland as against the successors of

Workman, it would have no effect whatever between purchasers of different tracts from the same original owner. Purchasers from Rowland of different parts of the land allotted to him could not claim the benefit of this covenant, as against each other. The plaintiff claims under Rowland. She does not show that the defendants owning parts of the Puente ranch do not also claim under him.

We cannot determine from the findings or evidence whether the tracts of land in this rancho, now owned by the several defendants and not contiguous to the surface flow of the creek, are entitled to riparian rights in the surface stream or not. The covenant above mentioned does not necessarily secure it to them. A subsequent conveyance by one of the original owners, of a part of the tract not abutting upon the creek, would not carry any riparian or other right in the creek, unless it was so provided in the conveyance, or unless the circumstances were such as to show that parties so intended, or such as to raise an estoppel. If the tract conveyed was not contiguous, had never received water from the creek, and there were no ditches leading from the creek to it at the time of conveyance, nor other conditions indicating an intention that it should continue to have the riparian right, notwithstanding its want of access to the stream, the mere fact that it was a part of the rancho to which riparian right had extended while the ownership was continuous from it to the banks of the stream would not preserve that right to the severed tract. The severance under such circumstances would cut off such tract from the riparian right. (*Anaheim W. W. Co. v. Fuller*, 150 Cal. 331, 88 Pac. 978.) The record does not show where these lands lie with respect to the stream, nor what were the covenants in the deeds by which they were segregated from the entire tract, nor the conditions then existing with respect to the use of the water. The court finds that each of said defendants, before he resorted to the use of wells and pumps had been accustomed to receive and use on his land some of the water from the creek, and that they each resorted to pumps and wells because of the diminution of the surface flow, but the conditions of such use, and the nature of the right under which it was had, are not shown except by the statement that it was water "which

they had appropriated and used for many years." How long the use had continued does not appear. The court finds ✓ that the wells of Currier, Persons, Dailey and Howell were bored and had been in operation more than five years before the action was begun. This defense will be considered hereafter. The other defendants cannot justify their taking ✓ of the underground water as a continuation of the riparian use recognized by the covenant in the Rowland-Workman deed, nor as an indirect exercise of a prescriptive right previously acquired by them in the flow of the creek, for they do not appear to have acquired a right of either character.

It appears, however, that the lands of all defendants except ✓ Currier are situated over the strata from which they obtain water and from which the creek is also supplied. The irrigated lands of the plaintiff are over the same strata. Defendants' lands are far above the plaintiff's place of diversion from the surface stream and they use the water only upon their overlying lands. The general rule, as now established by the decisions of this court, undoubtedly is that where two or more persons own different tracts of land, underlaid by porous material extending to and communicating with them all, which is saturated with water moving with more or less freedom therein, each has a common and correlative right to the use of this water upon his land, to the full extent of his needs if the common supply is sufficient, and to the extent of a reasonable share thereof if the supply is so scant that the use by one will affect the supply of others. (*Katz v. Walkinshaw*, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236; *McClintock v. Hudson*, 141 Cal. 281, 74 Pac. 849; *Cohen v. La Canada etc. Co.*, 142 Cal. 439, 76 Pac. 47; *Montecito etc. Co. v. Santa Barbara*, 144 Cal. 585, 77 Pac. 1113; *Burr v. Maclay*, 154 Cal. 434, 98 Pac. 260; *Barton v. Riverside Water Co.*, 155 Cal. 509, 101 Pac. 790.) Applying this rule, and assuming for the present that the right of the plaintiff is not paramount to that of the others, there can be no doubt that the taking of a part of the underground waters by the defendants is not unlawful, unless they take an unreasonable share thereof. As there is no presumption that the part so

taken by any defendant exceeds his reasonable share, it would be incumbent upon the plaintiff to prove it, and as she had made no attempt to do so, she cannot prevail against them.

She insists, however, that her right is paramount to that of the defendants to the use of these underground waters. Her land, or the part of it upon which she uses the water, is riparian to the creek. She, and her predecessors in interest, by means of a dam and open ditch, have diverted the water from the creek at a point below any of the lands of the defendants, and have used it upon her land ever since the year 1868, under claim of right, to the extent of about 250 miner's inches, whenever the stream was large enough to furnish that amount. The diversions of the defendants by their wells have materially contributed to the diminution of the surface stream, and have, to that extent, deprived her of the water to which she is entitled, if her right is superior to theirs. The question is thus presented whether or not the rights of a riparian proprietor, to the waters of a stream, extend to the subterranean waters above from which the stream proceeds, and are paramount to that of the owners of the lands which overlie those subterranean waters.

If the water in the underground strata is in such immediate connection with the surface stream as to make it a part of the stream, as the plaintiff seems to contend, then the defendants' lands overlying such water must be considered as also riparian to the stream, and, under the law of riparian rights, they have a common right with the plaintiff to the use of the water. In that case her use would not be adverse to them; they would not lose their right by disuse and their taking of a reasonable share would be lawful. (*Coleman v. LeFranc*, 137 Cal. 271, 69 Pac. 1011.) In *Verdugo etc. Co. v. Verdugo*, 152 Cal. 664, 93 Pac. 1021, a different rule was applied because in that case the right of the party taking the surface stream was paramount to the right of the other riparian owners along its course. It was made paramount by the force of a decree in partition setting apart the surface stream to the use of a particular tract of the land, exclusively, and consequently divesting the other lands of all right to the stream and giving the person owning the land

to which it was assigned the right to have its flow preserved undiminished. The rule which in that case was declared to apply to such of the underground waters as might prove to be unnecessary to the access to it would have the right to share reasonably in its use, is the rule applicable to the case at bar, if plaintiff has no paramount right. But the plaintiff insists that, by continuous use since 1868, she had gained a prescriptive right to the water of the stream, which, she claims, is paramount to said rights of the defendants, at least to the extent that they may not extract the underground water in such quantities as to deplete the surface stream to her injury. If this water is a part of the stream this claim is also untenable. The defendants, as riparian owners, would not lose their rights by disuse. Her use of the water, after it had passed through their lands and become part of the surface stream, would not injure them, nor constitute a trespass upon their property, and, hence, it would not be adverse to them, and could not be the foundation of a title by prescription as against them. (*Hargrave v. Cook*, 108 Cal. 78, 41 Pac. 18, 30 L. R. A. 390; *Bathgate v. Irvine*, 126 Cal. 140, 77 Am. St. Rep. 158, 58 Pac. 442; *Cave v. Tyler*, 133 Cal. 568, 65 Pac. 1089.)

There is also a claim that this underground water, as to a great part of the lands, has not the characteristics of a stream, but must be classed as percolating water. There will always be great difficulty in fixing a line beyond which the water in the sands and gravels over which a stream flows and which supply or uphold the stream ceases to be a part thereof and becomes what is called percolating water. Undoubtedly, the water in the lands of many of the defendants would be of the class ordinarily designated as percolating water. It is therefore important to determine the relative rights of the owner of the nonriparian land containing percolating water, which feeds a surface stream, and those who have acquired riparian or prescriptive rights in said stream, where the pumping of such percolating water and its use on the land in which it is found will diminish the surface stream, to the injury of those having such riparian or prescriptive rights therein.

(The owner of land has a natural right to the reasonable use of the waters percolating therein, although it may be moving through his land into the land of his neighbor, and although his use may prevent it from entering his neighbor's land or draw it therefrom.) This right arises from the fact that the water is then in his land so that he may take it without trespassing upon his neighbor. His ownership of the land carried with it all the natural advantages of its situation, and the right to a reasonable use of the land and everything it contains, limited only by the operation of the maxim, "*Sic utere tuo ut alienum non laedas.*" It is upon this principle that the law of riparian rights is founded, giving to each owner the right to use the waters of the stream upon his riparian land, but limiting him to a reasonable share thereof, as against other riparian owners thereon.) We think the same application of the principle should be made to the case of percolating waters feeding the stream and necessary to its continued flow.) There is no rational ground for any distinction between such percolating waters and the waters in the gravels immediately beneath and directly supporting the surface flow, and no reason for applying a different rule to the two classes, with respect to such rights, if, indeed, the two classes can be distinguished at all. Such waters, together with the surface stream supplied by them, should be considered a common supply, in which all who by their natural situation have access to it have a common right, and of which they may each make a reasonable use upon the land so situated, taking it either from the surface flow, or directly from the percolations beneath their lands. The natural rights of these defendants and the plaintiff in this common supply of water would therefore be coequal, except as to quantity, and correlative.

There is nothing in the facts alleged or proven giving to the plaintiff any paramount or superior rights in these waters. There is no evidence that she had ever used or diverted the water in such a manner as to interfere in any way with the use of percolating water by the defendants, or so as to make her use adverse to them and give her a prescriptive right against them for the amount she was accustomed to use.) She

and they alike must depend solely on their natural rights for the determination of the quantity they may take from this common supply. As she has failed to allege that they have taken or threaten to take more than a reasonable proportion of the water, and as she had no right superior to theirs, she has not established a cause of action against them with respect thereto.

The lands of the defendants, Ybarra and McClintock, are not within the Rancho de la Puente, but are within the San Jose Valley, and are situated over the same underground strata as the other lands hereinbefore mentioned. All that has been said with regard to the natural rights belonging to the lands of the other defendants applies with equal force to these lands. The facts are the same and the plaintiff has failed to establish a cause of action as to them.

The case against the defendant Currier stands upon different grounds. He pleaded the statute of limitations and the finding of the court is that the action was barred as against him. This finding is sustained by the evidence. He had diverted the water of the creek continuously and adversely to the plaintiff, under claim of right, and used it on his land for many years before the suit was begun, by means of a dam and ditch. The flow of the creek decreased, and being unable to obtain therefrom the waters he needed he put down seven wells in the bed of the creek, from three of which he obtained water equal to the quantity to which he had previously obtained the right by such adverse use. These wells were sunk more than five years before the action was begun. The evidence shows that the plaintiff knew of such use and knew that the flow in the creek immediately decreased. By reasonable inquiry she could have ascertained that the decrease was caused by the wells. Under these circumstances the action is clearly barred. Another well was bored by him within the five-year period. The court finds that the water flowing from it was very small. In order to make a case for an injunction it was necessary for the plaintiff to show substantial injury. She introduced no evidence of the quantity discharged from this well, resting it upon the testimony of the defendant that it was very small, as the court

found. In support of the finding and judgment we will presume that the quantity was negligible and the injury to the plaintiff therefrom too slight to justify an injunction.

The wells of Dailey, Persons and Howell having been also in use for more than five years, the action as against them would be barred by laches. The facts as to them were alleged in defense, but there was no plea of the statute of limitations on their behalf.

The evidence shows that Currier left his artesian wells uncapped and permitted the water therefrom to flow down the creek channel unused, so far as he was concerned, during the winters, when it was not needed. Plaintiff claims that this was a violation of the statute of 1878 (Stats. 1877-78, 195), declaring any uncapped artesian well from which water was permitted to flow and run to waste to be a public nuisance, and making it a misdemeanor in the owner of such well to permit such waste, and that, as the right to maintain a public nuisance cannot be gained by adverse use, the finding that the plaintiff's action, as against Currier, is barred by limitation, is erroneous. We cannot say that a private prescriptive right to private property may not be obtained by means of acts which may also constitute or cause a public nuisance. The private owner who is injured has a right of action in case of special injury, and such right is barred in the same manner as other actions of like nature. A private owner, so injured, cannot invoke the protection of the public right to abate the nuisance, which is not barred, and thus avoid the effect of the statute of limitations upon his private right of action. A further sufficient answer to this point is that the water from these wells did not go to waste during the irrigating season. The fact that it was allowed to flow without use during the winter when it was not needed for use by anyone, might make the uncapped wells a public nuisance during that season, but it would not have that effect during the time when the water was used, nor would it prevent Currier from acquiring, by adverse use during the regularly recurring irrigation seasons, the right to divert the water by the wells during that season.

It may be that the effect of allowing the water to flow from said wells during the winter is to unnecessarily lower the

water and decrease the pressure in the underground strata, and thereby reduce the creek flow during the ensuing irrigating season, or part of it, and possibly the plaintiff may have a cause of action to prevent such diminution from that cause. But the complaint does not allege such waste, and without such allegation it does not state a cause of action of that character.

There is no foundation for the proposition that the statute of limitations would not begin to run in favor of Currier, with respect to his right to maintain wells, until the extraction of water by his wells had begun to diminish the flow at the plaintiff's dam. The evidence shows that the effect was perceptible at the dam immediately, and that the plaintiff had knowledge of the flow from the wells and the use thereof by Currier from the beginning. This was sufficient to charge her with notice that the tendency of the diversion of the flow at those wells would be to reduce the amount in the stream below and to start the statute of limitations running.

There are no other points deserving of consideration.

The judgment and order are affirmed.

**Watercourse Defined—Easement to Discharge Surface Water
—Flood Waters.**

ANGELO SANGUINETTI, Respondent, v. WALTER R.
POCK, Appellant.

(136 Cal. 466, 89 Am. St. Rep. 169, 69 Pac. 98.)

CHIPMAN, C.—Action to have a certain levee constructed by defendant declared to be a nuisance and for damages. A jury was called to determine certain special issues and the court also made findings of fact.

Summarized from the findings, it appears that plaintiff and defendant own adjoining lands, as shown by the diagram; a natural waterway passes through these lands; its course is from east to west, and it extends eastward some distance east of the Mariposa road and westward through defendant's

land, and "in its natural condition was sufficient to conduct and carry away the waters which naturally accumulated thereon," and "the waters which accumulated in said waterway were, by means thereof, conducted and carried away from plaintiff's lands, and such waters were thereby prevented from accumulating on or flooding the lands of plaintiff." In December, 1896, defendant constructed a dam and levee across the bed of said waterway at the point where it enters defendant's lands, by means of which the water was obstructed in its flow, was diverted from its channel where it was accustomed to run, and was made to back upon and overflow plaintiff's lands to the injury of his crops during the year 1897 in the sum of \$40. Defendant continues to maintain his said levee and threatens so to do, and will thus deprive plaintiff of the enjoyment of his said land. The land of plaintiff and defendant is not situate on a plain substantially level and unbroken by waterways, but the land of plaintiff is higher than the land of defendant, "and through said land passes said waterway, by which the waters naturally accumulating on plaintiff's lands have been conducted and carried away." Mormon slough is a river, and is a branch of the Calaveras river, and flows nearly parallel with said waterway from east to west and about one mile distant on the north. "In seasons of high water the water flowing in Mormon slough overflows the banks thereof, and by means of the said waterway reaches the lands of the plaintiff, from whence such waters pass by means of the said waterway through defendant's lands." Plaintiff's crop was injured "in a freshet," but "said flow was not unusual or extraordinary for the season of the year when and where the same occurred." In the year 1896 defendant constructed along the eastern boundary of his land a levee and canal, or ditch, which at the south end connected with another ditch on the lands of S. Hewlett, but said ditch "is not sufficient to carry the waters which naturally fall, flow, or accumulate on the lands of plaintiff."

As conclusions of law, the court found that the levee of defendant is a nuisance, and plaintiff is entitled to have it abated and the restoration of the waterway to its former condition, and that defendant be restrained from further

constructing or maintaining said levee; also to recover \$40 damages. Judgment was accordingly entered. The appeal is by defendant from the judgment and the order denying his motion for a new trial. . . .

There are two principal questions presented to which counsel have chiefly devoted their attention: 1. Is the drainway mentioned in the findings shown by the evidence to be a watercourse, as defined by the courts, which defendant had no right to obstruct to protect his lands either against the ordinary rainfall flowing down this stream or the floodwaters of Mormon slough? 2. If no watercourse existed, had defendant the right to obstruct what he concedes was a depression in the land through which the rainfall accumulating on plaintiff's land was accustomed to flow over defendant's land? Briefly, had defendant the right to levee against the ordinary rainfall and also against the flood waters of Mormon slough?

1. It is settled law in this state that plaintiff, as the owner of the upper land, has an easement over the lower adjacent land of defendant to discharge surface water as it is accustomed naturally to flow, and defendant had no right to interrupt such natural flow to plaintiff's injury. The evidence was without substantial conflict that the depression, or so-called watercourse, running through defendant's and plaintiff's lands, was a natural drainway for the water accumulating from rainfall on plaintiff's lands, and that by constructing his levee across this swale, or drainway, the effect was to stop the flow of such water and to cause it to back over plaintiff's land to his injury. Defendant constructed a canal, or ditch, along this levee its entire length, on his own land, which but for its defects would probably be ample to carry away the water ordinarily falling from the clouds and accumulating on plaintiff's land; and if of sufficient capacity to carry this water, it is not claimed that the levee would injure plaintiff by reason of its being an obstruction to the passage of water ordinarily and usually accumulating on plaintiff's land. The evidence is conflicting on the point, but we think it sufficient to support the finding that defendant's said ditch had not capacity to carry the said waters at the time of the injury. . . .

A watercourse is defined to be "a running stream of water; a natural stream, including rivers, creeks, runs, and rivulets." (Black's Law Dictionary, title "Watercourse.") Further defining the term, this court said: "There must be a stream, usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of the tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing in the hollows or ravines in land, which is mere surface water from rain or melting snow (*i. e.*, snow lying and melting on the land), and is discharged through them from a higher to a lower level, but which at other times are destitute of water. Such hollows or ravines are not, in legal contemplation, watercourses." (*Los Angeles etc. Assn. v. Los Angeles*, 103 Cal. 466, 37 Pac. 375, citing text-books and cases.) The evidence does not bring the depression, or swale, in question within this definition. . . .

Our conclusion on the main question at issue is, that defendant had no right to obstruct the drainway as against the flow of water accumulating on plaintiff's land from rainfall (melting snow need not be mentioned, as no snow of consequence ever falls in that part of the San Joaquin Valley) without first providing a ditch, or canal, of sufficient capacity to carry such water as the said waterway was accustomed to carry to relieve plaintiff's lands. But defendant had the right to protect his land from the overflow waters of Mormon slough by a levee. As a new trial must be granted, a question may arise as to defendant's liability upon evidence showing that concurrently with the overflow of Mormon slough there was a heavy rainfall, which latter was sufficient to tax the capacity of said waterway. It is perhaps enough to say that plaintiff can recover damage only by showing that when the injury occurred there was flowing in the waterway sufficient water to fill it, which had accumulated on his land. Defendant may meet such evidence by showing that his ditch at that time had capacity to carry all the

water the drainway would carry. To prevent any restraining order as to the future, defendant may show that he has since (if he had not at the trial) so constructed his ditch as to carry all water to the full capacity of the said drainway. This much may safely be said to result from the principles already decided by this court, to which reference has been made. The other questions raised by the appeal do not call for discussion in view of what has already been said.

The judgment and order should be reversed and a new trial ordered.

See Read

Beneficiaries Under Public Use—Private Ownership and Joint Diversion.

EDWARD HILDRETH, Respondent, v. MONTECITO CREEK WATER COMPANY, Appellant.

(139 Cal. 22, 72 Pac. 395.)

SHAW, J.—These appeals arise out of the same action. No. 1113 is an appeal by the defendant from an order refusing to dissolve a preliminary injunction, and No. 1256 is an appeal by the defendant from the final judgment, taken within sixty days after its rendition, and presenting as the record on appeal the judgment-roll and a bill of exceptions containing the evidence. The two appeals will be considered together.

The sufficiency of the complaint is attacked by a general demurrer and by the motion to dissolve the injunction. The complaint does not state facts sufficient to constitute a cause of action. The purpose of the action is shown by the prayer, which is, that the defendant be enjoined from shutting off from the plaintiff's premises the water supply from Hot Springs creek theretofore used thereon, and from interfering with the flow thereof to, and the use thereof on, the said premises. The plaintiff in his complaint does not claim any ownership of or title to the water of the creek in himself, or as appurtenant to the land. The theory upon which the complaint is drawn is, that the water has been appropriated

and dedicated to public use; that plaintiff, as a beneficiary of the use, has been receiving a due proportion of the water for use on the premises; that defendant is in charge of this public use, and is therefore bound to continue to supply the water for use on the premises, upon payment or tender of the rates established therefor.

It must be admitted that a person, natural or corporate, cannot be said to be in charge of the administration of a public use of water, unless such person either owns or controls some water which is the subject of the use. And if one, claiming to be a beneficiary of the use, asks the court to protect him in its enjoyment, against a person claimed to be in charge of the use, he must show in his complaint that such person has the ownership or control of water which is the subject of the use. Otherwise, there can be no cause of action. There is no direct decision in this state on the precise question, but it was recognized as one of the fundamental conditions of such liability in *Price v. Riverside etc. Co.*, 56 Cal. 431. In that case the court, speaking of corporations organized for the distribution of water for public use, says that every such corporation "has impressed upon it a public trust, —the duty of furnishing water, if water it has, to all those who come within the class" for whose benefit the use was created. But the proposition is fundamental and needs no authority or discussion to support it. It is evident from an examination of the complaint that it was carefully and skillfully drawn so as to avoid the statement of this fact. After alleging the ownership by the plaintiff, as trustee, of three and a half acres of land situated in "The Montecito," and known as the "Lorenzana Place," it alleges the right of the plaintiff and the liability of the defendant as follows:

"II. That the defendant is a corporation organized under the laws of the state of California, and is the owner of and in the possession, management, and control of a system of waterworks and water-pipes constructed and laid in said Montecito for the public distribution and use in said Montecito of the water of the Hot Springs creek, and by means of which waterworks and pipes the said waters of Hot Springs creek have been appropriated and dedicated to public use as aforesaid.

"III. That for many years the premises of plaintiff aforesaid have been supplied with water from said . . . creek for (certain uses), by said defendant by means of its waterworks and pipes aforesaid . . . at the rate of one dollar per month . . .; that plaintiff has paid the said water rates as demanded by said company for such water supply for said premises, to and including the month of February, 1901; . . . and that plaintiff is willing, ready and able to pay for said supply to said premises as the same may be, or may become due," and desires to have the supply continued.

Allegations follow to the effect that in February, 1901, defendant gave notice to plaintiff of its intention to shut off "from said premises the supply of water heretofore furnished by defendant as aforesaid"; that defendant intends to, and will, unless restrained, cease to supply water to the premises; that plaintiff has no other means of supply, and will suffer irreparable damage.

It will be observed that while these paragraphs explicitly aver ownership and control by the defendant of a system of waterworks, they do not state that the defendant owns, controls, or has the right to control the waters of Hot Springs creek, or any other water. And although it is averred that by means of these waterworks the waters of the creek have been appropriated and dedicated to public use, it is not stated that this appropriation or dedication was made by the defendant, nor that the waters still remain subject to such use. For all that appears in the complaint some other person may at all times have been the owner and in control of the water, and may have made the dedication to public use, using defendant's waterworks as the means, and the defendant as the agent, for the distribution; or the water may have ceased to flow, or the public right may have been divested and the water converted to private use. This is well illustrated by the subsequent proceedings in the case, the court finding that the stockholders of the defendant are the owners and entitled to the use of all the waters of the creek, except that portion which has been theretofore distributed to the plaintiff's premises; and if there is any finding at all as to plaintiff's right, it is that he is the owner and entitled to the use of this excepted portion

under a right by appropriation and user, which right has been recognized and acquiesced in by defendant.

The pleading must be construed most strongly against the pleader. If a fact necessary to his cause of action is not alleged it must be taken as having no existence. The rule, sometimes applied, that defects in a pleading, consisting of facts appearing by implication only, will be considered as cured by the verdict of findings necessarily implying the existence of such facts, has no application here, because, as above stated, the finding is contrary to the inference or implication. Therefore, it must be assumed in ruling upon the demurrer that some other person or persons did own and control the water, and that the defendant was only in the management and control of the means by which that water was conveyed to the plaintiff's premises, and was not in charge of the public use of the water. For these reasons the demurrer should have been sustained and the preliminary injunction dissolved.

It may be added, in view of a possible amendment of the complaint in the lower court, that there is no direct allegation in the complaint that at the time the action was begun there was any water in Hot Springs creek which could be made the subject of public use, and there is no averment, except by inference, that there ever was any water flowing in that creek.

As there may be another trial in the lower court, it is proper to notice some other questions arising upon the record and likely to affect the final decision in the case. It is difficult to determine on what theory the court below founded its conclusion of law that the plaintiff was entitled to the injunction. It must have been either that the findings showed the plaintiff to be the owner of a portion of the waters of the creek by appropriation and use as an appurtenance to his land, of which right he had not been divested, or that the water was devoted to public use, and that plaintiff as a beneficiary of the use was entitled to have the water supplied to him so long as he paid the rates. If the former theory was adopted, then the findings are entirely outside the issues, and the judgment cannot stand. (*Schirmer v. Drexler*, 134 Cal. 134, 66 Pac. 180.) If it was the latter, then the conclusion is not justified

by the findings. There seems to be a claim, though not definitely stated either in the findings or briefs, that at times when there was more water than was required for the defendant's stockholders, the surplus was devoted to public use by the defendant, or its predecessor, and that plaintiff received water from this surplus. If this were true, the decree should have limited the plaintiff's right to the use only of this surplus water. But the findings do not warrant such claim.

The court below seems to have been in some uncertainty as to the nature of a use of water which could be called a public use. Section 1 of article 14 of the constitution declares that "The use of all water appropriated for sale, rental, or distribution" is a public use. So also does the act of March 12, 1885 (Stats. 1885, p. 95). It has been held that the word "appropriation" as used in the constitution is not limited to water appropriated under the provisions of the Civil Code, but is general in its meaning, and includes all water, however acquired, which is devoted to public use. (*Merrill v. Southside etc. Co.*, 112 Cal. 426, 44 Pac. 720.) But it cannot be held that the meaning of the constitutional provision should be so broadened as to cover the proposition that all water which is distributed among a number of persons is, from that fact alone, to be considered as devoted to a public use. Where a number of persons owning land are each entitled to take water from a common stream or source, for use upon their respective tracts of land, either by virtue of an appropriation under the Civil Code or by prescription, or as riparian owners, the water right of each is individual and several, and must be considered as private property and not the subject of public use, although the persons so owning interests in the stream are very numerous and their lands include a large neighborhood. The owners of such water rights may make a joint diversion, and may carry the water from the point of diversion in a common conduit, made with common funds, and in such a case in the absence of a special contract to the contrary, they will be the owners in common of the diversion works and conduits; but the respective water rights will remain several and will remain private property. If the persons owning such rights see fit to form a corporation and delegate to such corpo-

ration the work of making the diversion and distribution, and of constructing and keeping in repair the dams and conduits, reserving to themselves their rights in the water, as was done in this case, they do not thereby dedicate or appropriate to public use the water thus reserved and used by them. The corporation becomes merely their agent for the purpose of serving their several interests, so far as they may be served by a common system of works, the water remaining the subject of individual ownership and private use as before. . . .

In the case of a public use, the beneficiaries do not possess rights to the water which are, in the ordinary sense, private property. A public use "must be for the general public, or some portion of it, and not a use by or for particular individuals, or for the benefit of certain estates." (*McQuillen v. Hatton*, 42 Ohio St. 202.) "The use and benefit must be in common, not to particular individuals or estates." . . . The right of an individual to a public use of water is in the nature of a public right possessed by reason of his status as a person of the class for whose benefit the water is appropriated or dedicated. All who enter the class may demand the use of the water, regardless of whether they have previously enjoyed it or not.

With these principles in mind, there should be no great difficulty in determining whether all or any of the water was devoted to a public use of which plaintiff was a beneficiary, or was the subject of private ownership.

The judgment specifies no quantity of water to which plaintiff is entitled. His right would, at all events, be confined to his actual needs for use on the premises. But it is very apparent from all the evidence that his right, if any he has, may be still further curtailed by a scarcity of water, and any decree in his favor should define his share in such an event with as much certainty as the facts will allow. . . .

The judgment and order refusing to dissolve the injunction are reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

Use of Artesian Wells—Application of Statute Restricting Such Use.

Ex Parte ELAM.

(6 Cal. App. 233, 91 Pac. 811.)

ALLEN, P. J.—This is an application for a writ of *habeas corpus* presented by petitioner, who alleges that he is restrained of his liberty under a commitment issued upon default in payment of a fine assessed against him for a violation of the act of legislature approved March 6, 1907 (Stats. 1907, p. 122, c. 101), entitled "An act to prevent the waste and flow of water from artesian wells, and prescribing penalties therefor, and defining waste and artesian wells."

It is petitioner's contention that this statute is violative of the constitution of the United States and of the constitution of the state of California, and in conflict with the general laws. Section 1 of the act under consideration provides that an artesian well which is not capped or provided with mechanical appliances for arresting the flow of water therefrom is a nuisance, and the owner of the land upon which the same is situated is declared guilty of maintaining a nuisance if he suffers it to remain so uncapped or unprovided with mechanical appliances for arresting the flow, and any person maintaining such nuisance or causing or permitting water to unnecessarily flow from such well, or to go to waste, is guilty of a misdemeanor. By section 2 an artesian well is defined to be an artificial hole made in the ground through which water naturally flows from subterranean sources to the surface of the ground. By section 3 waste is defined to be the causing, suffering, or permitting the flow from an artesian well to run into any bay, pond, or channel, unless used thereafter for the beneficial purpose of irrigation of land or domestic use, or in any street, road or highway, or upon public land, unless it be used for the irrigation thereof, or for domestic use or the propagation of fish. It is further provided that when water is run upon land for irrigation purposes, if more than ten per cent thereof be allowed to escape therefrom,

the same shall constitute waste. Section 5 provides a penalty for the violation of any of the provisions of the act.

The first point made by petitioner—which is that the act is violative of the fourteenth amendment of the constitution of the United States, which provides that no state shall “deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law,” and of article 1, section 1, of the constitution of this state, which provides that “all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property,” and of section 13, article 1, which provides that no person shall be “deprived of life, liberty or property without due process of law”—seems to have been met and demonstrated to be untenable by the supreme court of the United States in the case of *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. ed. 729. By that case it is established that water, oil, gas and all fugitive substances held in their natural subterranean reservoirs are exceptions to the general rule establishing absolute ownership in the proprietor of the surface of all that lies underneath. That these minerals, being migratory in their nature, having no fixed *situs*, are a part of the soil only so long as they are on or in it, but after they escape and go to other lands the title of the former owner is gone; that it follows therefore that no one owner of the surface of the earth within the area beneath which these minerals move can exercise his right to extract from the common reservoir in which the supply is held without diminishing the source of supply as to which all other owners of the surface must exercise their rights; that, in consequence of the nature of the deposits, of their transmissibility, of their interdependence, of the rights of all, and of the public at large, the state could lawfully exercise the power to regulate the right of the surface owners among themselves to seek to obtain possession, and to prevent the waste of the products in which all the surface owners within the area wherein they were deposited, as well as the public, had an interest. “No divesting of private property, under such a condition can be

conceived, because the public are the owners, and the enacting by the state of a law as to the public ownership is but the discharge of the governmental trust resting in the state as to property of that character." This water, the ownership of which until actual possession is acquired, being in the public, or at least that portion of the public who may own the surface of the soil within the artesian belt, is subject to a reasonable use only by those interested therein. This reasonable use is determined in *Katz v. Walkinshaw*, 141 Cal. 134, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, to be the use of such amount of the subterranean water "as may be necessary for some useful purpose in connection with the land from which it is taken." The conditions existing in this state with reference to the necessity for the conservation of irrigating waters are most clearly set out in the case last cited, and the reasons for the rule restricting the use clearly shown. Whenever a land owner exceeds this reasonable use, he is appropriating to himself that which belongs to others who are entitled to a like use, and to that extent is obstructing the free use of property so as to interfere with its comfortable enjoyment, and which, by sections 3479 and 3480 of the Civil Code, is declared to be a public nuisance. Whatever right one has, even in his own, is subject to that established principle that his use shall not be injurious to the rights of others, or of the general public. This act therefore relates to waters, the right to the use of which is common to a large portion of the community, and affects the general public right. Legislation in relation thereto affects the public welfare, and the right to legislate in regard to its use and conservation is referable to the police power of the state, which is declared in *Ex parte Whitwell*, 98 Cal. 78, 35 Am. St. Rep. 152, 32 Pac. 870, 19 L. R. A. 727, to be "the power to make laws to secure the comfort, convenience, peace and health of the community." "The police power, deriving its existence from the rule that the safety of the people is the supreme law, justifies legislation upon matters pertaining to the public welfare, the public health or the public morals." (*Ex parte Drexel*, 147 Cal. 766, 82 Pac. 429, 2 L. R. A., N. S., 588.) It is settled law that all property is held subject to the exer-

cise of police power, and that provisions of the constitution declaring that property shall not be taken without due process of law have no application in such cases. (*Odd Fellows' Cem. Assn. v. San Francisco*, 140 Cal. 230, 73 Pac. 987.)

It is further contended by petitioner that the act violates section 21, article 1, of the state constitution, which provides that "no special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislature, nor shall any citizen or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens"; and he endeavors to demonstrate this proposition by the assumption that the surface owners are not prohibited by this act from extracting from this common source of supply any quantity thereof by means of pumps, that no attempt is made to restrict the use after the same is so pumped, and that the waste of such water so pumped is not violative of the act, and illustrates the claimed distinction by the statement that certain gun clubs within the arid region are pumping large quantities of this subterranean water, by means of which duck-ponds are filled and maintained, while other gun clubs whose ponds are fed by artesian wells are restricted in the use of the flow therefrom. It may be conceded that the courts have recognized the right of gun clubs to practically create a monopoly in wild game over large areas of land, and have protected them in so-called private proprietorship and limited dominion over such portions of the common property of the people of the state as they may induce to stay upon such preserves by feeding them and maintaining ponds therein. It may also be conceded that an exclusive right to hunt upon such preserves has also been held to be a species of property, and injunctions have been issued to prevent interference with the full exercise of such rights. (*Kellogg v. King*, 114 Cal. 378, 55 Am. St. Rep. 74, 46 Pac. 166.) But, while the maintenance of such duck-ponds no doubt contributes greatly to the enjoyment of the owner of the hunting privileges, it will scarcely be contended that this is a use of the water which is beneficial to the land. Neither does it follow that because the courts have recognized such exclusive hunting privileges, they must support the own-

ers thereof in an encroachment upon another more necessary common right of the public—that of the conservation of the subterranean waters of the state for domestic use and purposes of irrigation. We are not to be understood in thus meeting the reasons of the petitioner's argument as admitting that there is anything in the language of the act in question that would affect a gun club any more than an individual, association or incorporation. That one may show matters *dehors* an ordinance which is referable to the police power that such ordinance by reason of particular facts and circumstances is unreasonable and oppressive as to him is determined in *Re Smith*, 143 Cal. 370, 77 Pac. 180. No reason suggests itself why such right may not be recognized when the state has sought to exercise the same power; and, while courts may to a degree supervise such power, "they will not interfere except where the case be plain that needless oppression is worked and constitutional rights invaded." (*In re Smith, supra.*)

Nothing appears upon the face of the act, or in the record on this application, from which it can be said there is any discrimination as to the class of persons who may violate the provisions of the law. No special immunities or privileges are granted to any club, clubs, person or persons. That some clubs may maintain their ponds by pumping, while others, more fortunate, have theirs maintained by artesian wells or running streams, or tide water from the ocean, in no way affects the question. As well might it be said that legislative action affecting tide lands created special privileges or immunities because the duck-ponds of the clubs relying upon tide waters might be affected thereby.

As we have before attempted to show, no surface owner possesses the right to extract the subterranean water in excess of a reasonable and beneficial use upon the land from which it is extracted. Any additional extraction is not in the exercise of a right, if by such exercise the rights of others are injuriously affected. Nor can an appropriator take more water than he can beneficially use. Hence it follows that no discrimination is made between parties entitled to the exercise of a common right. Under the act in question, all may ex-

ercise their full legal right with reference to this water. As to the right to use any portion of that which belongs to the public, legislative control is applicable, and if, as a matter of fact, public rights are abused by the improper extraction of this public water by means of pumps, it is presumable that the legislature in the exercise of its proper functions will in due time arrest such waste. The game of the state belongs to the people in their collective capacity in a more general way than does the subterranean water within an artesian belt, yet no one will question the right of the state to restrict the manner in which fish may be taken from the water, whereby it is made a public offense to use a seine, while those who adopt the hook and line may take without offense. There is no special privilege or immunity granted to the man with the hook and line. The right to take at all, or in any particular season, either of game or any other thing public in its character, comes from the state and is subject to its regulation and control, and it is for the legislature to say what reasonable restrictions are necessary for the protection of this public property. (*Ex parte Kenneke*, 136 Cal. 527, 89 Am. St. Rep. 177, 69 Pac. 261.)

It is further contended that this act is violative of subdivision 33, section 25, article 4, of the state constitution, which provides that "the legislature shall not pass local or special laws in any of the following enumerated cases, that is to say; . . . in all other cases where a general law can be made applicable"; and also violates section 11, article 1, which provides that "all laws of a general nature shall have a uniform operation."

Assuming all that the petitioner claims for the act as to its establishment of a class, nevertheless "the true practical limitation of the legislative power to classify is that the classification shall be based upon some apparent natural reason, some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them." (*Nichols v. Walter*, 37 Minn. 272, 33 N. W. 802.) "A law which operates only upon a class of individuals is none the less a general law if

the individuals to whom it is applicable constitute a class which requires legislation peculiar to itself, in the matter covered by the general law, and which is germane to the purpose of the law." (*People v. Central Pac. R. Co.*, 105 Cal. 576, 38 Pac. 905.) It is obvious that different legislation is required peculiar to those whose lands are so situated with reference to the artesian supply that a natural flow results from a penetration into subterranean reservoir. The distinction between wells having a natural flow and those not so constituted is natural, and reasonably indicates the necessity or propriety of legislation restricting the former class. The right to so legislate, when the reason exists, is determined in *City of Pasadena v. Stimson*, 91 Cal. 251, 27 Pac. 604, *People v. Central Pac. R. Co.*, 105 Cal. 576, 38 Pac. 905, and *People v. Mullender*, 132 Cal. 221, 64 Pac. 299. This act operates uniformly upon every one owning lands upon which is located an artesian well of the kind and character specified in the act. "Section 11, article 1, of the state constitution, requiring all laws of a general nature to have a uniform operation, is satisfied when the law operates uniformly upon all persons standing in the same category, and upon rights and things standing in the same relation." (*Wigmore v. Buell*, 122 Cal. 144, 54 Pac. 600.)

It is further contended that a discrimination exists because of the provision which permits the maintenance of ponds for the propagation of fish, as distinguished from the maintenance of ponds for other purposes. The propagation of fish has always been recognized as a legitimate pursuit and as an effort to increase the food supply of the world, and the use of water therefor a beneficial use, which, like the use for irrigation or domestic purposes, is declared by the act to be the highest use to which this natural element may be applied. The legislature has the right to determine what uses are superior in kind and to protect the same, and it is within its province to determine that certain uses of this public property are of a higher character and superior in right to other uses. This right is subject only to the constitutional limitations against discriminations. Having so determined, and no just criticism being applicable thereto, the value of such uses must

be held to be established. We are not called upon in this case to determine the legislative right to regulate or protect the extraction of this subterranean water for transportation or sale by those owners of the surface whereon the use of water is not required for those higher uses, nor of prescriptive rights asserted or claimed in such instances, but simply to hold that for the uses which have been determined subordinate the great subterranean water supply may not be applied to the detriment of the higher uses, and that legislation directed to the conservation of such water, as in this act, is not prohibited by any constitutional provision. "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." (*In re Spencer*, 149 Cal. 400, 117 Am. St. Rep. 137, 86 Pac. 896; *Sinking Fund Cases*, 99 U. S. 718, 25 L. ed. 496.)

Writ denied.



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